111-549

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 323.

WILLIAM H. THORWEGAN, PLAINTIFF IN ERROR,

vs.

RICHARD KING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 3, 1881.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition 3 of the judgment of a plea which is in the said circuit court before you, at the September term, 1879, thereof, between Richard King, plaintiff, and William H. Thorwegan, defendant, a manifest error hath happened to the great damage of the said defendant as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 4th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri.
By A. P. SELBY, *Deputy.*

Allowed by—
SAMUEL TREAT, *Judge.*

1½ *Return to Writ.*

THE UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said circuit court, at office in the city of St. Louis, this 2d day of September, A. D. 1881.

[SEAL.] M. M. PRICE,
Clerk of said Court.
By A. P. SELBY, *D. C.*

[Endorsed:] No. 1276. United States Circuit Court, Eastern District of Missouri. Richard King *vs.* Wm. H. Thorwegan. Writ of error to the circuit court of the United States, E. D. of Missouri.

2 The United States of America to Richard King, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein William H. Thorwegan is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 4th day of January, in the year of our Lord one thousand eight hundred and eighty-one.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

2½ [Endorsed:] United States circuit court, eastern district of Missouri. Richard King *vs.* Wm. H. Thorwegan. Citation. Service accepted 4th March, 1881. B. Kinney, att'y pl'ff.

3 UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States in and for said District.

Be it remembered that on the 13th day of July, 1878, in vacation of the circuit court of the United States for the eastern district of Missouri, there was filed in the office of the clerk of said court a certain petition, which said petition is in the words and figures following, to wit:

Petition.

In the Circuit Court of the United States.

EASTERN DISTRICT OF MISSOURI, *ss:*

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } September Term, 1878.

Richard King, a citizen of Corpus Christi, in the State of Texas, plaintiff in this suit, by his attorneys, Wilcox & Kinney, complains of William H. Thorwegan, a citizen of St. Louis, in the State of Missouri, defendant in this suit of a plea, that the said de-
4 fendant render unto the said plaintiff the sum of twelve thousand dollars, with interest thereon, at the rate of six per

centum per annum, from the first day of October, A. D. 1876, lawful money of the United States of America, which the said defendant unto the said plaintiff owes, and from him unjustly detains.

For that on or about the first day of October, A. D. 1876, the plaintiff purchased from the defendant an undivided one-eighth interest in the steamboat known as, by, and under the name of "The Grand Republic," there lying, and being at the wharf in the city of St. Louis, State of Missouri, for which he, plaintiff, was to receive, according to the terms of the purchase, one-eighth of the capital stock of The Grand Republic Transportation Company, a corporation to be formed to purchase said boat; that for said undivided eighth interest so purchased plaintiff paid to said defendant the aforesaid sum of twelve thousand dollars, in good and lawful money of the United States of America, and that thereupon,

5 on said first day of October, A. D. 1876, as a part of the said contract of sale, the said plaintiff and defendant further entered into certain articles of agreement in words and figures as follows, to wit:

"This agreement, made and entered into this first day of October, 1876, between William H. Thorwegan, of the city of St. Louis, and Richard King, of Corpus Christi, Texas, witnesseth: That whereas said King has purchased from me, the said Thorwegan an one-eighth interest in the steamer Grand Republic, for which he is to receive one-eighth of the capital stock of a corporation to be organized for the purpose of purchasing said steamer, and as I have agreed as a part of the terms of said purchase, that I will keep and make the said steamer free and clear of all incumbrances up to this date—

Now, therefore, the said Thorwegan hereby covenants and agrees with the said King that he will hold the said King harmless from all claims, incumbrances, and liabilities existing on said steamer at the date above written, and I hereby agree to pay all claims and incumbrances existing on said steamer on the first day of October,

6 1876, as well as all maritime and other liens, so that no part thereof, as against him, shall be chargeable or paid by the said new company.

In witness whereof, I have hereunto set my hand and seal, as of the date first above written.

WM. H. THORWEGAN. [SEAL.]

Which said agreement is hereto attached, and marked "A."

That the defendant, Thorwegan, as provided for and contemplated in said agreement, did, on the 6th day of October, 1876, organize and incorporate the Grand Republic Transportation Company, under and by authority of the laws of the State of Missouri; that said Grand Republic Transportation Company has a capital stock of one hundred thousand dollars, which was divided into one thousand shares, each of said shares having the face value of one

hundred dollars; that said Thorwegan subscribed for, took, and received nine hundred and ninety-seven shares of said capital stock, and subsequently issued and delivered to plaintiff one hundred and twenty-five shares of said capital stock, being one-eighth of the entire amount of said capital stock, while plaintiff 7 was to receive for his one-eighth interest in said steamer, as set forth in said agreement, said stock being hereto attached, marked "B."

That on the 17th day of October, A. D. 1876, the said Grand Republic Transportation Company, as contemplated in said agreement, purchased the said steamer Grand Republic for the sum of one hundred thousand dollars, the said Grand Republic Transportation Company assuming all liabilities due by said steamer, which purchase, as aforesaid, was unanimously approved by the board of directors of said company.

Plaintiff avers that at the time he purchased from defendant the one-eighth interest in said steamer Grand Republic, as aforesaid, on or about the first day of October, 1876, the said defendant stated and represented to plaintiff to induce him to make said purchase, that there was only a small amount of indebtedness, claims, and liens against said steamer Grand Republic, to wit, about twelve thousand dollars to fifteen thousand dollars in the aggregate, as stated by said Thorwegan, and that he, the said defendant, by applying some seven thousand dollars of the twelve thousand so received from plaintiff in payment 8 and liquidation of said indebtedness, existing as aforesaid, against said steamer Grand Republic, (which he promised to do,) would be able to pay and would pay any indebtedness, claims, or liens which remained against said steamer Grand Republic, and have them released and discharged, so that said eighth interest, as well as the whole of said steamer, when transferred to said Grand Republic Transportation Company, would be entirely free and clear of all liens and incumbrances; that defendant further stated and represented at the time said agreement was made, on said 1st day of Oct., A. D. 1876, that said steamer was making a great deal of money, and that the investment of the said twelve thousand dollars in said boat was an exceedingly good one, and would prove exceedingly profitable and remunerative.

Plaintiff further avers that, placing entire confidence in and relying upon the said statements and representations of the defendant, as aforesaid, and fully believing them to be true, he pur- 9 chased said one-eighth interest in said steamer Grand Republic and entered into said agreement, paying to the said defendant, as consideration therefor, the said sum of twelve thousand dollars, as aforesaid, and that plaintiff, placing full reliance, credit, and faith upon the truthfulness, honesty, and fairness of said defendant, and the aforesaid statements and representations made at the time of said purchase of said one-eighth interest in said steamer, thereby was induced to and did part with said sum of money aforesaid, viz.,

twelve thousand dollars, paying the same over to the said defendant.

Plaintiff further avers and charges that, on said first day of October, A. D. 1876, and at the time said sale and agreement were made and entered into, and prior thereto, there were claims, liens, incumbrances, and indebtedness existing against said steamer Grand Republic to a large amount, aggregating in the whole some sixty or seventy-five thousand dollars, as near as plaintiff can ascertain, and that defendant at the time of said sale, and at the time said agreement was made and entered into, as aforesaid, and
10 prior thereto, knew that said claims, liens, incumbrances, and indebtedness existed at that time and prior thereto against said steamer Grand Republic to the said large amount of sixty to seventy-five thousand dollars, and defendant knew at the time of said sale and agreement that neither he nor the steamer Grand Republic Company could pay or discharge said claims, liens, incumbrances, and indebtedness then and at that time existing against said steamer to the amount of said $60,000 or $75,000.

Plaintiff further avers that by reasons of the facts herein set forth the said stock in the Grand Republic Transportation Company issued by the defendant to the plaintiff, as contemplated by said agreement, is utterly valueless and worthless, and ever has been so, since it was issued, as aforesaid, by defendant to plaintiff.

Plaintiff further avers that at the time said sale and agreement were made and entered into, as aforesaid, the defendant well knew that the statements and representations made by him, as aforesaid, to the plaintiff were false and untrue, and that said
11 fraudulent statements, representations, and concealments were so made, as aforesaid, by the defendant to the plaintiff to cheat and defraud plaintiff out of said sum of twelve thousand dollars, paid by plaintiff to defendant, as aforesaid; that defendant willfully and maliciously designing and intending to injure and defraud plaintiff, made such fraudulent, false, and untrue statements and representations to plaintiff, as aforesaid.

Plaintiff further avers that he is a citizen of and resides in the State of Texas, and by reason of absence from the city of St. Louis and State of Missouri, and the trust and confidence reposed by him in defendant, the frauds and concealments practiced, as aforesaid, by defendant on plaintiff were not discovered or known by plaintiff until the —— day of July, 1878; that after said sale and agreement were made and entered into, as aforesaid, the defendant made and rendered various and numerous statements of the financial condition of said Grand Republic Transportation Company to plaintiff, which statements showed the said steamer Grand Republic
12 and said Grand Republic Transportation Company to be free and clear of all liens, claims, and indebtedness whatever, and said statement showed said steamer and said Grand Republic Transportation Company were earning large sums of moneys in excess of expenses, and that the same were placed in proper propor-

tion to the credit of plaintiff on the books of said Grand Republic Transportation Company; but plaintiff has recently discovered that said statements, so rendered by defendant to plaintiff, as aforesaid, were false and untrue, and that the earnings of said steamer and said Grand Republic Transportation Company were used and applied to the payment of the liens, debts, and claims against said steamer which existed prior to and on the first day of October, 1876, the date of said sale and agreement, as hereinbefore set out.

Plaintiff further avers that a short time after having discovered the frauds, concealments, and deceits practiced by defendant on plaintiff as hereinbefore set out, he, said plaintiff, to wit, on
13 the —— day of July, 1878, before the bringing of this suit, offered to re-transfer and return to defendant the said one hundred and twenty-five shares of stock in the Grand Republic Transportation Company, received from defendant as hereinbefore set forth, and to do all things and acts necessary *necessary* to put defendant in the same condition as if said contract had not been made; and at the same time plaintiff notified said defendant that said contract by him would be and was rescinded and held for naught, and considered void by reason of the fraud practiced by defendant as aforesaid, and then and there demanded the return of the said sum of twelve thousand dollars paid by plaintiff to defendant, as hereinbefore set forth, which sum defendant then and there failed and refused to return and repay, and still holds and retains from plaintiff.

Wherefore, upon the facts and averments herein made and set forth, plaintiff seeks and asks judgment against the said William H. Thorwegan for the said sum of twelve thousand dollars, with interest thereon, at the rate of six per centum per annum,
14 from said first day of October, 1876, to the day of rendition of judgment, and for costs of suit.

WILCOX & KINNEY,
Atty's for Pl'ff.

Upon which petition there was issued a summons, which, with the marshal's return, is in words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *Sct:*

In the Circuit of the United States, in and for said District.

The President of the United States of America to the marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon William H. Thorwegan, citizen of the State of Missouri, that he be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of September next, then and there to answer the

complaint of Richard King, citizen of the State of Texas,
15 as set forth in the petition filed in said court on the 13th day of July, A. D. eighteen hundred and seventy-eight.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 13th day of July, A. D. eighteen hundred and seventy-eight.

Issued at office, in the State of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk.*
By S. L. CRAWFORD, *Deputy.*

Marshal's Return.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *Set:*

I return this writ, executed by delivering a copy thereof, with a copy of the petition thereto attached, to Wm. H. Thorwegan on the 15th day of July, A. D. 1878, in the city of St. Louis, in the above district.

H. W. LEFFINGWELL,
United States Marshal, Eastern District of Missouri.
By C. E. SOEST, *Deputy.*

16 And afterwards, to wit, on the 18th day of September, 1878, there was filed for record in the office of the circuit clerk of the United States circuit court for the eastern district of Missouri the following demurrer, to wit:

Demurrer.

U. S. Circuit Court, Eastern Dist. of Mo.

RICHARD KING
vs.
WM. H. THORWEGAN. } No. 1276.

Now comes defendant and demurs to the petition of the plaintiff filed herein, because the same is insufficient in law, in this:

First. The said petition does not contain facts sufficient in law to constitute a cause of action.

Second. The allegations in said petition are so uncertain and indefinite that defendant cannot safely answer same.

Wherefore he prays judgment whether he should make further or other answer to same, and for the dismissal of defendant with his costs.

GIVEN CAMPBELL,
Att'y for Def't.

And afterwards, to wit, on the 26th day of September, 1878, the following further proceedings were had, and appear of cord in the above-entitled cause, to wit:

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } 1276.

Now comes the plaintiff, by his attorney, and by leave of court files an amended petition herein.

Which said amended petition is in words and figures following, to wit:

Amended Petition.

In the United States Circuit Court, Eastern District of Missouri.

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } September Term, 1878. Amended Petition.

Richard King, a citizen of Corpus Christi, in the State of Texas, by Wilcox & Kinney, his attorneys, complains of William H. Thorwegan, a citizen of St. Louis, in the State of Missouri, de-
18 fendant in this suit, of a plea that the said defendant render unto the said plaintiff the sum of twelve thousand dollars, with interest thereon, at the rate of six per centum per annum, from the first day of October, 1876, lawful money of the U. S. of America, which the defendant unto the said plaintiff owes and from him unjustly detains.

For that, on or about the first day of October, 1876, the plaintiff and defendant entered into an agreement whereby the said defendant, in consideration of the sum of twelve thousand dollars, to him paid by plaintiff, promised and agreed that plaintiff should become interested in the steamer Grand Republic, and that defendant would forthwith organize a corporation for the purpose of purchasing said steamer Grand Republic, and that after the formation, organization, and incorporation of said corporation, and the purchase of said steamer Grand Republic, defendant would issue and deliver to plaintiff, in consideration of said $12,000.00, one-eighth of the capital stock of such corporation; that in pursuance of said agreement said defendant did, on the sixth day of October, 1876, organize and incorporate, under and by the authority of the laws of the
19 State of Missouri, the Grand Republic Transportation Company, having a capital stock of one hundred thousand dollars, which was divided into one thousand shares of the face value of one hundred dollars each; that defendant, Thorwegan, subscribed for, took, and received nine hundred and ninety-seven shares of said stock, and subsequently issued and delivered to plaintiff one hundred and twenty-five shares of said stock, being one-eighth of the entire amount thereof, said stock being hereto attached, made a part hereof, and marked "B;" that on *on* the 17th day of October, 1876, the Grand Republic Transportation Company, as contemplated in said agreement, did purchase said steamer Grand Republic for the sum of one hundred thousand dollars, the said steamer

at that time being subject to liens and liabilities against her, amounting to about seventy-five thousand dollars, the said Grand Republic Transportation Company assuming all liabilities due by said steamer, all of which was duly approved by the board of directors of said company; that a further part of said agreement and transaction between plaintiff and defendant on said first day of October,
20 1876, the said defendant entered into and executed and delivered to plaintiff a certain article of writing in words and figures as follows, to wit:

"This agreement, made and entered into this first day of October, 1876, between William H. Thorwegan, of the city of St. Louis, and Richard King, of Corpus Christi, Texas, witnesseth:

"That whereas said King has purchased from me, the said Thorwegan, an one-eighth interest in the steamer Grand Republic, for which he is to receive one-eighth of the capital stock of a corporation to be organized for the purpose of purchasing said steamer, and as I have agreed, as a part of the terms of said purchase, that I will keep and make the said steamer free and clear of all incumbrances up to this date—

"Now, therefore, the said Thorwegan hereby covenants and agrees with the said King, that he will hold the said King harmless from all claims, incumbrances, and liabilities existing on said steamer at the date above written; and I hereby agree to pay all claims and incumbrances existing on said steamer on the first day of October, 1876, as well as all maritime and other liens, so that no part
21 thereof as against him shall be chargeable or paid by the said new company.

"In witness whereof, I have hereunto set my hand and seal, as of the date first above written.

"(Signed) WM. H. THORWEGAN. [SEAL.]"

The same being attached hereto, made a part thereof, and marked "A."

Plaintiff states that at the time he entered into said agreement and paid defendant said twelve thousand dollars as aforesaid, on or about the first day of October, 1876, said defendant stated and represented to the plaintiff to induce him to enter into said agreement and pay said twelve thousand dollars, that there were only a small amount of claims, liens, incumbrances, and indebtedness existing against said steamer Grand Republic, to wit, about $12,000, or $15,000 in the aggregate, and that he, said defendant, would forthwith pay off and discharge the same, so that said steamer, when transferred to said new company, would be free and clear of all claims, liens, incumbrances, and indebtedness whatsoever, and so that no part of said liens, claims, incumbrances, and indebtedness, then existing against said steamer, should be chargeable to plaintiff or paid by said new company; that defendant further stated and
22 represented to plaintiff, to induce him to enter into said agree-

ment and pay said $12,000 to defendant as aforesaid, that the investment of said $12,000 in said steamer would prove an exceedingly good and profitable one.

Plaintiff further states that, placing entire confidence in and relying upon the said statements and representations of the defendant, as aforesaid, and fully believing them to be true, and being influenced thereby, he entered into said agreement, paid said defendant said $12,000.00, and received said one hundred and twenty-five shares of stock in said Grand Republic Transportation Company, as aforesaid, and that plaintiff, placing full reliance, credit, and faith upon the truthfulness, honesty, and fairness of the said defendant, and the aforesaid statements and representations, fully believing them to be true, entered into said agreement, and parted with and paid over to defendant said sum of $12,000.00.

Plaintiff further states and charges that on said first day of October, 1876, and prior thereto, there were claims, liens, incumbrances, and indebtedness, existing against said steamer Grand
23 Republic to a large amount, aggregating in the whole to some seventy-five thousand dollars, as near as plaintiff can now ascertain, and that defendant at that time, and when said agreement was made, and said $12,000.00 paid as aforesaid, well knew that said claims, liens, incumbrances, and indebtedness existed against said steamer Grand Republic to said large amount of said seventy-five thousand dollars, and that said defendant, nor said steamer could pay or discharge said indebtedness, liens, claims, and incumbrances then existing against said steamer, to said large amount of seventy-five thousand dollars; that by reason of the facts hereinbefore set forth, and the existence of said large amount of indebtedness, liens, claims, and incumbrances against said steamer, and the assuming of the same by the said Grand Republic Transportation Company, said stock issued by defendant to plaintiff, as aforesaid, was and is worthless and without value; that at the time said agreement was made, and said $12,000.00 paid as aforesaid, the defendant well knew that the statements and representations made by him to plaintiff, as above set forth, were false and untrue,
24 and that said fraudulent statements, representations, and concealments were so made as aforesaid by the said defendant to plaintiff to cheat and defraud plaintiff out of said sum of twelve thousand dollars, paid as aforesaid by plaintiff to defendant.

That defendant, willfully and maliciously designing to injure and defraud plaintiff out of said $12,000.00, made said fraudulent, false, and untrue statements and representations as aforesaid to plaintiff.

Plaintiff further states that he is a citizen of the State of Texas, and by reason of absence from the city of St. Louis and State of Missouri, and the trust and confidence placed by him in defendant, the frauds and concealments practiced as aforesaid by defendant on plaintiff were not discovered until the — day of July, 1878; that after said agreement was made and entered into as aforesaid, defendant

made and rendered to plaintiff numerous and various statements showing the financial condition of said Grand Republic Transportation Company, which statement shows said company to be free and clear of all indebtedness whatever, and that the earnings of said company were largely in excess of the expenses
25 thereof, and that such excess of earnings were placed in proper proportion to the credit of plaintiff on the books of said company; that plaintiff has recently learned that said statements, so rendered by defendant, were false and untrue, and that the earnings of said Grand Republic Transportation Co. were used, applied to, and consumed by the defendant as paying the liens, incumbrances, claims, and indebtedness existing against said steamer Grand Republic, (and assumed by said Grand Republic Transportation Co.) prior to said first day of October, 1876.

Plaintiff further states that immediately after having discovered the frauds, concealments, and deceits practiced as aforesaid by defendant on plaintiff, to wit, on the — day of July, 1878, before the bringing of this action, he offered to retransfer and return to defendant said one hundred and twenty-five shares of stock in the Grand Republic Transportation Company received from defendant as aforesaid, and to do all things necessary to put defendant in the same condition as if said contract had not been made, and at the same time plaintiff notified defendant that said contract
26 would be, and was, rescinded and held for naught, and considered void, by reason of the fraud practiced by defendant as aforesaid, and then and there demanded the return of the said sum of $12,000.00 paid by plaintiff as aforesaid, which sum defendant then and there refused to return and repay, and still holds and detains from plaintiff.

Wherefore, upon the facts and statements herein made and set forth, plaintiff seeks and asks judgment against the said William H. Thorwegan for the said sum of twelve thousand dollars, with interest thereon, at the rate of six per centum per annum, from October 6th, 1876, and costs of this suit.

WILCOX & KINNEY,
Att'ys for Plaintiff.

And afterwards, to wit, on the 27th day of September, 1878, there was filed in the office of [the] clerk of the U. S. circuit court the following demurrer to amended petition, which is in words and figures, to wit:

27 *Demurrer to Amended Petition.*

U. S. Circuit C't, East. Dist of Mo.

RICHARD KING
vs.
WM. H. THORWEGAN. } No. 1276.

Now comes defendant and demurs to the amended petition of

plaintiff filed herein, because the same is insufficient in law, for this:

1st. The said petition does not state facts sufficient to constitute a cause of action.

2d. The said petition recites in our court several alleged causes of action.

3d. The said petition recites an alleged cause of action for breach of contract, with an alleged cause of action deceit.

4th. The said petition inextricably confuses an alleged cause of action on a contract, with a cause for damages for false representations, so that the defendant cannot safely answer same.

Wherefore he prays judgment whether he ought to make other or further answer to same, and prays to be hence dismissed with his costs.

GIVEN CAMPBELL,
Att'y for Def't.

And afterwards, to wit, on the 12th day of October, 1878, the following further proceedings were had, and appear of record in said cause, to wit:

28 *Demurrer to Amended Petition Sustained.*

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } 1276.

Now come the parties, by their attorneys, and the court, having considered the demurrer of defendant to the amended petition of plaintiff, orders that said demurrer be, and the same is hereby, sustained.

And afterwards, to wit, on Oct. 19th, 1878, the following further proceedings were had, and appear of record in said cause, to wit:

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } 1276.

Now comes the plaintiff, by his attorneys, and by leave of court files his second amended petition herein.

Which said second amended petition is in words and figures following, to wit:

2d Amended Petition.

UNITED STATES OF AMERICA, *State of Missouri:*

In the United States Circuit Court, Eastern District of Missouri.

29 RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } September Term, 1878. 2d Amended Petition.

Richard King, a citizen of Corpus Christi, in the State of Texas,

by Wilcox & Kinney, his attorneys, complains of William H. Thorwegan, a citizen of St. Louis, in the State of Missouri, defendant in this suit, of a plea that the said defendant render unto the said plaintiff the sum of twelve thousand dollars had and received by the def't to plaintiff's use, with interest thereon at the rate of six per centum per annum from the first day of October, A. D. 1876, lawful money of the United States of America, which the defendant unto the said plaintiff owes, and from him unjustly detains. For that whereas heretofore, to wit, at the city of St. Louis, in the State of Missouri, on or about the first day of October, A. D. 1876, the defendant stated and represented to plaintiff that he, the defendant, was the sole owner of the steamboat known by the name of the Grand Republic, then employed by him in the navigation of the waters of the Mississippi river between the city of St. Louis,
30 in the State of Missouri, and the city of New Orleans, in the State of Louisiana, and the defendant then and there, at the time aforesaid, with a view and design to injure, cheat, and defraud the plaintiff in the transaction hereafter set out, knowing said boat then and at that time to be heavily incumbered with liens, claims, and debts for a large sum, to wit, for or about the sum of seventy-five thousand dollars, falsely and fraudulently represented to plaintiff that said boat was substantially free from all liens, claims, debts, and liability, and that if it was subject to any debts, liens, liabilities, or claims, they were for but a small amount in the aggregate, and that he, the defendant, would forthwith pay off and cause the same to be discharged as a preliminary to merging the title and ownership of said boat in a corporation to be organized by defendant to receive such title and ownership, and to issue stock therein, representing the full value of said boat, free and clear of all incumbrances, debts, liens, and liabilities then existing against said boat.

And the plaintiff further says that the defendant, in pur-
31 suance of his fraudulent designs as aforesaid, further represented to plaintiff that; in consideration that plaintiff would advance to defendant at that time, to wit, on or about the first day of October, A. D. 1876, the sum of twelve thousand dollars, he, the plaintiff, should become interested in said boat, and that he, the defendant, would forthwith organize such corporation as aforesaid, and convey to it the title of said boat free of all incumbrance and liability, and issue to the plaintiff one hundred and twenty-five shares of stock herein which would represent one-eighth of the title and ownership of said boat free of all incumbrance and liability, and be one-eighth of the entire amount of the capital stock of such corporation.

And the plaintiff further says that he, the plaintiff, fully relied upon said representations and fully believed the same to be true, and especially the representation of the defendant that said boat was at that time substantially free and clear of all debts, incumbrance, and liability, and that said boat would be wholly free and clear of the same when merged in and the title and owner-

32 ship transferred to the said corporation, and so believing, and in full reliance upon the truth of said representations did, on or about the said first day of October, A. D. 1876, at the defendant's special instance and request, advance to him, the defendant, the sum of twelve thousand dollars in cash in consideration that the plaintiff should become interested in said boat, and that the defendant would cause to be issued to the plaintiff said shares of stock in corporation representing one-eighth of the full unincumbered value of said boat as aforesaid.

And the plaintiff further says that the defendant, in pursuance of his crafty and fraudulent designs as aforesaid, on or about the sixth day of October, A. D. 1876, caused said proposed corporation to be duly organized under the name of the Grand Republic Transportation Company, with a capital stock of one hundred thousand dollars, which was awarded into shares of the face value of one hundred dollars each, conveyed to it, said corporation, said boat, but subject to incumbrances and liabilities as aforesaid, to wit, about the sum of seventy-five thousand dollars, and caused to be
33 issued to plaintiff said one hundred and twenty-five shares of stock as aforesaid, purporting to represent one-eighth of the unincumbered value of said boat as aforesaid.

And the plaintiff further says that said boat, at the time aforesaid, and when transferred to said corporation as aforesaid, was incumbered with debts, claims, liens, and liabilities for near the market cash value, to wit, about the sum of seventy-five thousand dollars, and so remained from that time forward, and that said one hundred and twenty-five shares of stock in said Grand Republic Transportation Company, so issued by the defendant to the plaintiff as aforesaid, were in consequence of an incumbrancy upon said boat, as hereinbefore set forth, without value and utterly worthless, and have so remained to the time of the institution of this suit.

Plaintiff further says that by reason of his absence from the city of St. Louis, and his residence in the State of Texas, he had no means of ascertaining the condition of said boat at any time, and, placing full reliance upon the representations of the defendant, he, the
34 plaintiff, never came to or had any knowledge of said frauds and the facts in relation to said liens, incumbrances and liabilities existing against said boat, as hereinbefore set forth, until about the —— day of July, A. D. 1878, and that immediately thereupon, to wit, on or about the —— day of July, A. D. 1878, before the bringing of this action, he, plaintiff, tendered to the defendant said one hundred and twenty-five shares of stock in said Grand Republic Transportation Company, so issued by defendant to plaintiff as foresaid; and then and there plaintiff demanded from defendant the return and repayment of said twelve thousand dollars, which the defendant then and there refused to return and repay, and still owes and wrongfully detains from plaintiff.

Wherefore plaintiff says that an action has accrued to him to have and recover of the defendant said sum of twelve thousand

dollars, so fraudulently obtained through the medium of the aforesaid fraudulent representations of the defendant, with interest thereon from said first day of October, A. D. 1876, for which sum, with the interest aforesaid, plaintiff asks judgment against the defendant.

WILCOX & KINNEY.
Att'ys for Pl'f.

35 And afterwards, to wit, on the 28th day of October, 1878, there was filed in the office of the clerk of the circuit court the following demurrer to 2d amended petition, which is as follows, to wit:

Demurrer to 2d Amended Petition.

U. S. Circuit Court, East. Dist. of Mo.

RICHARD KING
vs.
WM. H. THORWEGAN. } No. 1276.

Now comes defendant and demurs to the second amended petition herein filed, and says that the same is insufficient in law, because the said petition does not state facts sufficient to constitute a cause of action against this defendant. Wherefore he prays that he be hence discharged with his costs.

GIVEN CAMPBELL,
Att'y for Def't.

And afterwards, to wit, on the 9th day of November, 1878, the following further proceedings were had and appear of record in said cause, to wit:

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } 1276.

36 Now come the parties, by their attorneys, and the court, having considered the demurrer of defendant to the second amended petition of plaintiff, and being fully advised thereof, orders that said demurrer be overruled, and thereupon ten days leave is granted said defendant to answer.

Afterwards, to wit, on November 18th, 1878, there was filed in the office of the circuit court of the United States the following answer of defendant, which is in words and figures as follows, to wit:

Answer of Defendant.

Circuit Court United States, E. Dist. of Mo.

RICHARD KING
vs
WILLIAM H. THORWEGAN. } No. 1276.

Now comes defendant, and, for his answer to the second amended

petition of plaintiff here filed, denies all and singular the allegations in said petition contained, except such as may be hereafter specially admitted, and further answering, defendant specially denies each and every allegation of fraudulent or deceitful character set up in said 2d amended petition, and says that the same are false and scandalous.

37 And further answering, this defendant says, that while he denies any liability or indebtedness of any kind whatsoever to plaintiff by reason of anything alleged in said petition, yet he says that said petition alleges said pretended claim to have arisen and to have accrued prior to the thirtieth day of October, 1877, and he therefore says that the said defendant is fully and forever debarred from prosecuting such pretended claim against him, because he says that on the 26th day of July, 1878, he was forever discharged from all claims and demands provable against his estate in bankruptcy on 30th of October, 1877, and that if said plaintiff concurred that he had any claim or demand against the estate of defendant in bankruptcy, he could have prevented and proved up his claim against the estate of defendant in bankruptcy under and in virtue of the laws of the United States, and defendant pleads, as a perpetual defence and bar against said pretended claim or demand of plaintiff, his discharge in bankruptcy, in the words and figures as follows:

"District Court of the United States, Eastern District of Missouri.

38 "Whereas William H. Thorwegan has been duly adjudged a bankrupt under the act of Congress, establishing a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and the acts amendatory thereof, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said William H. Thorwegan be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the thirteenth day of October, A. D. eighteen hundred and seventy-seven, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

"Given under my hand and the seal of the court at St. Louis, Missouri, in the said district, this twenty-sixth day of July, A. D. eighteen hundred and seventy-eight.

["SEAL.] (Signed) SAM'L TREAT."

And defendant says that said pretended claim or demand is effectually barred by his discharge aforesaid.

39 Wherefore he prays to be hence discharged with his costs.

GIVEN CAMPBELL,
Att'y for Def't.

And afterwards, to wit, on the 21st day of November, 1878, there

was filed for record in the office of the circuit clerk a demurrer to part of defendant's answer, which is in words and figures following, to wit:

Demurrer to part of Def't's Answer.

In the U. S. Circuit court, Eastern Dist. of Mo.

RICHARD KING
vs.
WM. H. THORWEGAN. } No. 1276. Demurrer to part of Defendant's Answer.

And the said plaintiff, as to the special plea bar contained, stated, and set forth in the answer of the said defendant, demurs thereto and saith that the same and the matters therein stated and contained, the manner and form as the same is pleaded and set forth, is insufficient in law to bar or preclude him, the said plaintiff, from having and maintaining his aforesaid action against him, the said defendant.

Wherefore, by reason of the insufficiency of such part and
40 so much of said answer on this behalf, the said plaintiff prays judgment against the said defendant, &c.

WILCOX & KINNEY,
Pl'tf's Att'ys.

And afterwards, to wit, on the 26th day of March, 1878, the following further proceedings were had and appear of record in said cause, to wit:

Order Overruling Demurrer.

RICHARD KING, Plaintiff,
vs.
W. H. THORWEGAN, Defendant. } No. 1276.

Now come the parties, by their attorneys, and the court, having considered the demurrer to the answer, orders that the said demurrer be overruled, and thereupon plaintiff files replication to said answer.

Which said replication is in the words and figures following, to wit:

Replication.

In the U. S. Circuit Court, East. Dist. of Mo.

RICHARD KING
vs.
WM. H. THORWEGAN. } No. 1276. Replication.

Now comes the said plaintiff and, replying to the answer of
41 the said defendant filed in the above cause, denies each and every material allegation therein stated and set forth, and further replying to said answer, plaintiff denies that the discharge of the said defendant in bankruptcy, as pleaded in said answer, is any bar to plaintiff's right of action on recovery in this said cause, because plaintiff's right of action and recover against the said

defendant arose and accrued to plaintiff by reason of the fraud of the said defendant, as stated and set forth in the petition of plaintiff filed herein.

Wherefore plaintiff prays judgment against the said defendant as prayed in plaintiff's petition.

B. KINNEY,
Att'y for Plaintiff.

And afterwards, to wit, on the 29th day of March, 1879, the following stipulation was filed in the office of the clerk of the U. S. circuit court, which is in words and figures following, to wit:

Stipulation.

U. S. Circuit Court.

RICHARD KING,
vs.
WM. H. THORWEGAN, } No. 1276.

It is agreed that this cause may be continued.

B. KINNEY,
Att'y for Pl't'ff.

42 GIVEN CAMPBELL,
Att'y for Def't.

March 28, '79.

And afterwards, to wit, on the 25th day of September, 1879, the following further proceedings were had and appear of record in said cause, following, to wit:

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } 1276.

Now come the parties by their attorneys, the plaintiff, by Messrs. Wilcox and Kinney, and the defendant, by Given Campbell, Esquire, and this case being regularly called for trial, and both parties being ready, it is ordered that a jury come, and thereupon come said jury, to wit: Benjamin F. Bowen, James A. Ferguson, John White, J. H. Talbott, Benedict Caudle, George Klein, W. J. Wilson, Antoine Boyer, John Hartwell, C. C. Morrison, C. M. Matthews, and Charles Hinrichs, twelve good and lawful men, duly impanneled and sworn to well and truly try the issues joined herein; and thereupon the evidence was partly heard, but not being concluded at the
43 hour of adjournment, it is ordered that further proceedings herein be continued until to-morrow morning.

And afterwards, to wit, on the 26th day of September, 1879, the following further proceedings were had and appear of record in said cause, to wit:

Verdict and Judgment.

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } 1276.

Now again come the parties by their attorneys, the plaintiff, by Messrs. Wilcox and Kinney, and the defendant, by Given Campbell, Esquire; and also come the jury herein as on yesterday, to wit: Benjamin F. Bowen, James A. Ferguson, John White, J. H. Talbott, Benedict Caudle, George Klein, W. J. Wilson, Antoine Boyer, John Hartwell, C. C. Morrison, C. M. Matthews, and Charles Hinrich, who, after hearing the evidence and arguments of counsel, and receiving the charge of the court, return the following verdict:

"We, the jury, find for the plaintiff, and assess his damage at twelve thousand dollars.

"BENJAMIN BOWEN, *Foreman.*"

It is therefore considered by the court that the plaintiff, Richard King, have and recover of said defendant, William H. Thor-
44 wegan, as well the said sum of twelve thousand dollars the damages aforesaid by the jury assessed, as also the costs herein expended, and have thereof execution.

And afterwards, to wit, on the 27th day of September, 1878, there was filed in the office of the clerk of the circuit court a notice for a new trial, which said notice is in the words and figures following, to wit:

Motion for a New Trial.

U. S. Court, Eastern District of Mo.

RICHARD KING *vs.* WM. H. THORWEGAN.

Now comes defendant and moves the court to set aside the verdict in this case and grant a new trial, for the following reasons:

1. Because the verdict of the jury is contrary to the instructions of the court.
2. Because the verdict is contrary to the evidence.
3. Because the verdict is contrary to the weight of the evidence.
4. Because the verdict is contrary to the law.
5. Because the court erred in admitting evidence for the plaintiff contrary to the objections of defendant, and refused to admit legal evidence offered by defendant.
45 6. Because the verdict is excessive and shows prejudice on the part of the jury.
7. The court misdirected the jury.

GIVEN CAMPBELL,
Att'y for Def't.

And afterwards, to wit, that on the 22d day of January, 1880, the following further proceedings were had and appear of record in the above-entitled cause, to wit:

Remittitur Filed.

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } 1276.

This day comes the plaintiff, by Brockwood Kinney, Esquire, his attorney, and files a remittitur of five thousand dollars on the judgment heretofore recovered herein for twelve thousand dollars; whereupon it is ordered by the court, in accordance with said remittitur, that said judgment now stands as for the sum of seven thousand dollars. It is further ordered that the motion of defendant heretofore filed for a new trial herein be, and the same is, overruled.

And afterwards, to wit, that on the 8th day of March, 1880, the following further proceeding was had and appears of record
46 in said cause, to wit:

Order Filing Bill of Exception.

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } 1276.

Now comes the defendant, by attorney, and presents his bill of exceptions, which is allowed and signed by the Honorable Arnold Krekel, acting judge, who presided at the trial of this case, and is ordered to be filed as a part of the record herein.

And afterwards, to wit, on January 4th, 1881, the following further proceedings were had and appear of record in the above cause, to wit:

Writ of Error Allowed.

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } 1276.

Now comes defendant, by his attorney, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said plaintiff to be and appear at a Supreme Court of the United States at the next term thereof, on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge. And said defendant also presents to the court a bond in the pena sum of five hundred dollars, which is approved and ordered to be filed as a part of the record herein, and the bill of exceptions filed on 8th day of March, 1880, is in the words and
47 figures following, to wit:

Bill of Exceptions.

In the United States Circuit Court for the Eastern District of Missouri.

RICHARD KING, Plaintiff,
vs.
WILLIAM H. THORWEGAN, Defendant. } No. 1276.

Be it remembered that at the trial of this cause, the plaintiff in support of the issues on his part, offered in evidence the deposition of Richard King, and the same was read to the jury.

Notice to Take Depositions.

In the U. S. Circuit Court, Eastern District of Missouri.

RICHARD KING, Plaintiff,
against
WM. H. THORWEGAN, Defendant.

To the above-named William H. Thorwegan, you are hereby notified that depositions of witnesses to be read in evidence in the above-entitled cause on the part of the plaintiff will be taken at the Room No. 10, Lindell Hotel, in the city of St. Louis and State of Missouri, on the 18th day of June, 1879, between the hours
48 of eight o'clock in the forenoon and six o'clock in the afternoon of that day, and that the taking of said depositions, if not completed on that day, will be continued from day to day at the same place, and between the same hours until completed.

B. KINNEY *for Pl'ff.*

Service of the above notice is hereby acknowledged, and issue of dedimus, and all exceptions as to time, waived June 17th, 1879.

GIVEN CAMPBELL,
Att'y for Def't.

United States of America, Eastern District of Missouri.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that on this 18th day of June, A. D. 1879, I, L. L. Walbridge, a notary public within and for the State and city aforesaid, and duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit courts of the United States did call and cause to be, and personally appear before me, at room No. 40, Lindell Hotel, in the city of St. Louis, in the said eastern district as aforesaid, Richard King,
49 to testify, and the truth to say, on the part and behalf of the plaintiff, in a certain suit or matter of controversy now depending, and undeterminedi n the United States circuit court, wherein Richard King is plaintiff, and W. H. Thorwegan is defendant, on the part of the plaintiff, it was stipulated and agreed by the

parties to said cause, who were respectively represented by counsel, the testimony of the witness might be taken in short hand, and subsequently transcribed upon a type-writer, and read in evidence without the signature of the deponent thereto.

Deposition of Richard King.

And the said Richard King, of lawful age and sound mind, having been by me first carefully examined, cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matter in controversy, did thereupon depose, as follows:

Examination by B. KINNEY, Esq.:

1 interrogatory. State your residence and occupation.

Answer. I have been a steamboatman the greater portion of my life, and am now in the stock business, trading cattle, horses, and sheep.

2 int. Where do you live?

A. I live in Nueces county, Texas.

50 3 int. Are you the plaintiff in this case?

A. Yes, sir.

4 int. State when and where you first met the defendant, William H. Thorwegan?

A. The first time, I think, that I spoke to Captain Thorwegan, was on the corner of Walnut street, St. Louis; I was walking down on Sunday morning, I think, in company with Captain Garrett, and he introduced me then and there to Captain Thorwegan; that is the first time I ever spoke to him, I think.

5 int. State what occurred at this meeting.

A. Nothing particular; we talked some time on the corner, I think, and walked back to the hotel, and maybe to Gregory's and took a drink, but I wouldn't be positive; Gregory's was then on the corner; he kept a rum-mill on the corner.

6 int. State when you next saw Captain Thorwegan.

A. I saw him off and on every day and talked with him several days after that.

7 int. State when you first saw him in regard to money matters.

A. I went into Gregory's one day to take a drink, and Captain Thorwegan was sitting down, I think, on a chair at a table in the bar-room with a handful of papers in his hand; and he said

51 he was ruined if he didn't get some money that day; that his insurance had run out; that he had no money to pay it; that he had bills to pay, and that if he didn't get it that day his notes would be protested, and I don't know what all he said; but he made a great ado in a talking and crying sort of way.

8 int. Did you let him have some money that day?

A. I told him then, says, "I will draw a check on the Mechanics' Bank, and I will let you have $5,000," and he said he would rather I would go with him and get it, or might draw it myself, and I told

him I would go to the bank with him and get it. I went to the Mechanics' Bank with him and got it and gave it to him, $5,000.

9 int. Did you take any receipt?

A. Nothing at all.

10 int. State when you next saw him in regard to the purchase of an eighth interest in the steamboat Grand Republic and the capital stock in the Grand Republic Transportation Company.

A. He had taken me up to his boat after that time, several times; we went in a carriage, and we went in the hold and all over
52 it, all about her, up-stairs and down-stairs, and all over her; we must have went three or four times, I reckon, and I was thinking of buying a little boat that was lying up there, close by that boat, a little iron boat, and then he talked to me about buying an interest in his boat, and one thing and another, and talked along some days, and finally I agreed to take an eighth interest in the boat at $12,000.

11 int. That was $7,000 besides the $5,000 you had let him have?

A. Yes, sir.

12 int. State what he said at that time, and when this was, the month and year, as near as you can.

A. I think it was in September; sometime between the middle, maybe the 15th or 20th of September, I am not positive as to the date, but I think in September, 1876; I think the $7,000 was paid about the first of October.

13 int. State what, if anything, Captain Thorwegan said at this time in regard to the indebtedness existing against the boat.

A. He said if he could get that much money it would pay out the debt, and would leave her clear of all debts, and that if
53 he didn't get the money the boat would be tied up before he left here and he wouldn't be able to turn a wheel.

14 int. Did he say anything about the amount of indebtedness existing against it at that time?

A. No, sir; not that I can remember.

15 int. This transpired in the city of St. Louis?

A. Yes, I think the first time I spoke to him was on a Sunday morning; I was boarding at the Southern.

16 int. State what, if anything, Captain Thorwegan said in regard to forming a corporation and issuing to you stock in it.

A. He said he would form a corporation and put the boat into a corporation at $100,000, and issue me one-eighth of stock for my $12,000.

17 int. State if you recognize that as the stock Captain Thorwegan issued to you?

(Papers shown to the witness, marked Exhibit A, and attached to this deposition.)

A. Yes, sir.

18 int. State whether or not Captain Thorwegan said at that

time anything to you in regard to turning the boat over to this new corporation free and clear of debts, liens, and incumbrances?

54 Defendant's counsel objected to the question, as leading.

A. He said that he would turn her over clear of all incumbrances in every particular to the stock company.

19 int. When after that, if at all, did you see Captain Thorwegan, the defendant?

A. After what time?

20 int. After the issuing of this stock.

A. I didn't see him at all until I came up here some months after I think I came up here, the boat had run all one season.

21 int. State what transpired between you at that time, if anything, in regard to the condition of the boat as to indebtedness and business.

A. I left here for my home in Texas, I can't state what time, but I think in October, 1876, and Captain Thorwegan soon after that I think left for his home in the South with his boat, the boat had not left here when I left; I had left for my home previous to her leaving this place.

22 int. State if anything was said by said Captain Thorwegan at that time in regard to the condition of the boat and business, whether or not there was any indebtedness existing against her, or anything of the sort.

55 Objected to, as leading.

A. At what time?

23 int. The second time you saw him.

A. He made me statements here, and sent statements to my home made out by his clerk here, and then he took me up-stairs in his room, and showed me the statement of the account what she was doing, her prospects and all that, and then took me aboard the boat; they were doing some repairs on her at the time. This was a few days before she burned, and I then remarked to the Capt. that he better keep a good lookout for her, lying alongside that iron boat.

24 int. State if you recognize that.

(Paper shown to the witness.)

A. This is a copy of the statement made by this gentleman, the clerk of the boat, a statement of the account of the boat.

(Statement offered and objected to, and marked Exhibit B, and attached to this deposition.)

Counsel for the defendant objected to the papers as being a copy.

25 int. Where is the original?

A. I think they are at my ranche in Texas, but I don't know.

26 int. Do you know where the original of this copy is?

56 A. I think they are at the ranche, but I wouldn't be positive.

27 int. State whether or not you recognize that document?

(Another paper shown, which is attached to this deposition, and marked Exhibit C.)

A. Yes, sir.

28 int. State where you got it, and from whom.

A. I got it from Captain Thorwegan; I think Mr. Miltenburger was present at the time. All debts due and all demands on the boat, repairs, etc., up to the time when the boat left the wharf on her trip south in October, 1876, were to be settled and paid by Capt. Thorwegan.

Defendant's counsel objected to the answer, as irrelevant.

29 int. Say if you recognize that paper; and, if so, state where you got it, and from whom?

(Paper shown to the witness marked Exhibit D, and attached to this deposition.)

A. I got it at the same time I got the other.

30 int. Who gave it to you?

A. Capt. Thorwegan, in the presence of Mr. Miltenburger; I got them both together.

31 int. State if you recognize that document?

(Paper shown to witness, marked Exhibit E, and attached to this deposition.)

Objected to by defendant's counsel.

A. Yes, sir; I got that at the same time.

32 int. From whom?

57 A. From Thorwegan; all the papers were handed to me at the same time.

33 int. State when, about the time, that was given to you by Capt. Thorwegan and Mr. Miltenberger?

A. It was given to me when I came up here, before that boat burned.

34 int. In the fall of 1877?

A. Yes, sir.

35 int. State whether or not you know what position, if any, George Miltenberger occupied in the fall of 1877 on the steamer Grand Republic?

A. He was chief clerk, I think.

36 int. State if you recognize that document? (Paper shown.)

A. Yes, sir; I got this at the same time I got the balance.

37 int. From whom?

A. Capt. Thorwegan; I got them all at the same time; I went up in his room.

38 int. You got it in the latter part of the summer or beginning of the fall of 1877.

A. I got it here at the time just before the boat burned up.

39 int. Do you know when the boat was burned?

A. I don't know; I saw an account in the papers; after I left here I was up at Leavenworth, attending to some business; I was here on my way up there.

(Paper referred to offered in evidence, marked Exhibit F,
58 and attached to this deposition.)

Objected to by defendant's counsel, as incompetent.

40 int. State whether or not at any time, or at the time Capt. Thorwegan gave you these papers that you have identified, he said anything to you regarding the indebtedness existing against the boat at that time?

A. Nothing at all

41 int. Did he ever at any time state to you that the boat was in debt?

Defendant's counsel objected to the question, as leading.

A. When he got the money from me, he got it, he said, to pay her debts; I don't know what he done with it.

42 int. Did he say this money was to pay the debts existing against that boat at that time?

Defendant's counsel objected to the question.

A. He said he kept this $5,000 for that purpose, and the balance would put him out with her clear of all debts and everything to go down South.

43 int. State whether or not there was ever any cash value to this stock in this Grand Republic Transportation Company issued to you by Capt. Thorwegan.

A. Not that I know of.

46 int. Did you place full reliance and credit on the state-
59 ments of Captain Thorwegan in regard to the condition of that steamboat?

Defendant's counsel objects to the question, as leading.

A. I did; I had perfect confidence in them.

45 int. When did you first discover, if at all, the amount of indebtedness existing against the steamboat Grand Republic?

A. I never knew anything at all of it until after she burned.

COUNSEL FOR THE PLAINTIFF: I desire to offer this book, marked Exhibit G, especially the record of the meeting, October 17, 1876, and the meeting, October 17, 1877, offered in evidence, and marked Exhibit G.

Defendant's counsel objected, as incompetent.

46 int. State, if you please, what that paper Exhibit C shows the net earnings of the steamer Grand Republic to have been in all the trips she made up to the time she burned.

Defendant's counsel objected.

A. $42,619.27.

47 int. State whether or not Captain Thorwegan ever paid you any of the earnings of that boat, or the Grand Republic Transportation Company?

A. No, sir; not a cent that I know of.

48 int. State whether or not you ever drew any dividends.

A. No, sir; I came up here expecting to get my portion
60 of the earnings of the boat; but I got no money, nothing but these papers?

49 int. You got no money?

A. I got nothing, not a cent.

50 int. State whether or not you ever got any of the insurance money that was on the steamer Grand Republic.

Defendant's counsel objected.

A. No, sir.

51 int. State what, if anything, ever occurred between you and the defendant in relation to the money that was due to you from the Grand Republic Transportation Company.

A. I came here expecting to get my money, and Captain Thorwegan asked me if I could let him have some more money. When I came up he said he wanted some more money; I don't know for what—repairing, or something; I told him I had no money; I told him when I came down again if I had any money I might let him have some; I believe that is about all.

52 int. Did you or not know at this time, or at any time, of any indebtedness existing on the steamer Grand Republic, or the Grand Republic Transportation Company?

A. No, sir; I did not.

53 int. State whether or not the defendant agreed, and
61 stated to you that this 125 shares of stock in the Grand Republic Transportation Company should represent one-eighth of the full, un[in]cumbered value of that boat.

Objected to, as leading.

A. Yes, sir.

54 int. Did you place full reliance and belief on the representations and statements of the defendant?

Objected to, as before.

A. I did, sir; I had perfect confidence in him from the time I left him here.

55 int. State whether or not you recognize that despatch.

(Paper shown.)

A. Yes, sir; I sent that from Corpus Christi to this house.

(Paper offered in evidence marked Exhibit H, and attached to this deposition.)

Objected to, as incompetent and irrelevant.

56 int. State whether or not you were in St. Louis in the month of July, 1878, or the latter part of June?

A. I was here I know last summer; I can't state as to the dates; I can refer to the books down stairs.

57 int. State whether or not, in the summer of 1878, was the first knowledge you had of any debts existing against the steamer Grand Republic and the Grand Republic Transportation Company?

62 Objected to, as incompetent and irrelevant.

A. I didn't know there was any debt existing on her at any time that I know of until I heard of it after she was burned; Capt. Thorwegan, I understood, had collected all the insurance; I don't know anything of it positively.

58 int. When, if at all, Capt. King, did you first learn that there was over $75,000 of indebtedness against the Grand Republic Transportation Company and the steamer Grand Republic?

Objected to.

A. I was one evening down stairs and met Capt. Thorwegan, and I was asking him about the affairs of the boat and what was done with the insurance money and one thing and another, and he said he had taken it to pay to the creditors of the boat, and that was the first that I knew anything about the matter; we had some words about it, and he told me to come down the next day or the next morning to the boat and he would fix everything so that I would lose nothing; I went down the next day to the boat but he never said anything to me about it; the boat left that morning; we were sitting in the rotunda of this hotel.

63 59 int. State whether or not you knew of any indebtedness existing against the steamer Grand Republic or the Grand Republic Transportation Company until I told you of it in the summer of 1878.

Objected to, as leading.

A. I don't remember; I was not here but very little from the time the boat left here, I think, until she burned here; I don't think that I saw her at all; she left in October, I think, and I was not here; I had gone home after that; when she left I think that I was gone home; I am almost positive.

60 int. You cannot state when you first learned of this indebtedness existing against the boat?

A. I cannot.

Cross-examination by GIVEN CAMPBELL, Esqr., for defendant:

61 int. The first money that you loaned Capt. Thorwegan, I understand, was $5,000?

A. Yes, sir.

62 int. And that was loaned to him, growing out of a conversation you had with [him] at Gregory's about his condition?

A. Yes, sir.

64 63 int. He said that he was in a tight place, that he had no money to pay his insurance, and wanted you to let him have some money?

A. And I loaned him $5,000.

64 int. Now, just state exactly what he said.

A. Just exactly as I stated before; I went in, and he was sitting down, I think, at a table, if I am not mistaken.

65 int. He told you that he was in a tight place and needed some money, that he had to pay his insurance, and was low spirited, and asked you if you would let him have some money; that was the first $5,000?

A. Yes, sir; that is the first $5,000.

66 int. When was that?

A. It was in September, I think, 1876; I can't state the exact date; I can get the exact date at the Mechanics' Bank.

67 int. Now, state exactly what Capt. Thorwegan said to you at that time, as near as you can recollect.

A. I don't remember, only just as I stated, that he had a bundle of papers in his hands this way, (indicating,) and spoke about his insurance and one thing and another.

58 int. You loaned that money to him out of friendship at that time?

A. Yes.

69 int. You wanted to help him along?

65 A. Yes, sir.

70 int. And then after that you had other conversations with him, and went down to the boat with him several times; looked at the boat with him, which was in the process of construction at that time, or being rebuilt, or something of the kind, wasn't it so?

A. She was about ready; she was getting ready to start for the business; I think they were painting her at the time.

71 int. You went down and looked all over her, saw what kind of a boat she was; then he told you he wanted some more money; now state what he said to you at that time?

A. Well, I don't remember; he wanted me to buy an interest in her.

72 int. He wanted some more money, though, that was his object, wasn't it?

A. He wanted me to buy an interest in the boat.

73 int. Well, what did he say?

A. He offered me one-eighth of the boat for $12,000, unincumbered and clear of everything.

74 int. What did he say; give his exact language, if you recollect?

A. Well, I can't state positive.

75 int. He wanted you to buy an eighth interest in the boat?

66 A. He wanted me to buy an interest in the boat.

76 int. What did you say to him?

A. Well, I think we talked the matter over several days, and I finally agreed to take an eighth in her.

77 int. When was that consummated?

A. That was closed somewhere the last days of September, 1876.

78 int. Now, at whose suggestion was it that she was turned into stock company; didn't you propose that; and didn't you tell him you didn't want to be a general owner in the boat, and generally liable; that you preferred to have your interest in stock?

A. That was agreed; that was the agreement that the boat was to be put in a stock company at $100,000.

79 int. Was not that your desire, and didn't you tell him that you didn't want to be a general owner, or words to that effect; that you preferred to have her in a stock company, so that your liability would be the amount of your stock; that, being away in Texas, you were not able to watch the boat?

A. I think, probably; I don't exactly know at whose suggestion it was; I can't state positively whether me or not.

67 80 int. It was with your desire wasn't it; wasn't she put in the stock company with your desire?

A. Yes; no question about that.

81 int. Your idea was to limit your liability to the amount of your stock, wasn't it?

Objected to, as incompetent.

A. Mr. Day was there present, and Capt. Thorwegan and myself; he knows about it; the only question that came up was in his office; I don't think the question was ever mentioned at any other place where we were.

(Last question repeated.)

A. I think Mr. Day was the one that suggested that, if I am not mistaken.

82 int. What was your idea in having it put in as stock?

A. I consulted with Mr. Day something about it, and I think he suggested it; I didn't think of it at the time; I think Mr. Day suggested it.

83 int. You accepted the suggestion?

A. I wouldn't say positive now on that point; it was something that might have been talked of several times, but I don't remember.

84 int. You gave him this money?

A. I gave him $7,000.

85 int. When did you give him that money?

A. About the first of October, as near as I know of.

68 86 int. You gave it to him before you got your stock?

A. Yes; sometime; Mr. Day had attended to the stock?

87 int. What did Capt. Thorwegan say was his object in selling

you an interest in the boat; why did he wish to sell you an interest in the boat?

A. I don't know what his object was; he said he needed money.

88 int. Did he tell you he was in debt.

A. No, sir; he said he owed some money on these papers, and owed money to get his boat out; he was afraid they would attach her before she got out. He told me he hadn't got the money, and didn't know as he would get her out if he didn't get the money; I asked him why he didn't get the money out of the bank, and he said the bank wouldn't advance him any on the boat.

89 int. Did he make a showing or statement to you of the affairs of the boat before you loaned him this money?

A. Not a thing.

90 int. Then after you loaned him the money a stock company was formed and you got your certificate of stock?

69 A. Yes, sir; I got that at my home in Texas; it was sent to me by Mr. Day; he had it fixed after I left.

91 int. You are an old steamboat man?

A. Yes, sir.

92 int. Didn't you think that was a good boat?

A. It was a very good boat.

93 int. You are a good judge of a boat are you not?

A. Well, I don't know as I am perfect; I have seen a good many of them.

94 int. In buying an interest in that boat, you thought you were buying into a boat that would make some money, didn't you?

Plaintiffs counsel objected to the question, as immaterial.

A. I have no object at all in that transaction; it was just to help Thorwegan; at least he told me he made a statement to me of his necessities and everything of that kind.

95 int. It was a mere act of friendship on your part then, nothing else?

A. That, and nothing else.

96 int. He was in trouble, and you wanted to help him out?

A. I gave it to him more on that than anything else; I never thought of making a dollar out of the transaction; as far as

70 the boat was concerned, she was a good boat, no doubt about that.

97 int. Don't you remember Captain Thorwegan and Miltenburg both told you you could come down and examine the books and look into her affairs as much as you wanted to?

A. No, sir; I don't remember anything about that; I had nothing to do with the boat at the time.

98 int. I mean at the time they wanted you to buy an interest in her.

A. No, sir; I don't remember anything about it at all; he never spoke to me about the books at the time; I would buy nothing with incumbrances on it.

99 int. She had never made a trip when you bought into her, had she?

A. Yes; she had been running the season, or a portion of one; I don't know how long; the agreement was, the liabilities and everything was settled up to the day the boat left, clear of all incumbrances on the day when she left this wharf; everything was clear up to that day.

100 int. When was that agreement made?

A. It was made along about the last days of September, somewhere about there.

101 int. He told you he would pay off all her debts?

71 A. He told me he would pay off all her debts on repairs and everything, and that the boat should be turned over at the wharf, ready to receive freight without a dollar's incumbrances.

102 int. He told you that he would do that?

A. Yes, sir.

103 int. And he borrowed money from you to help him do that?

A. I don't know what he done with it.

104 int. I say that is what he told you; he wanted to get the money from you to help him do that?

A. That is what he said, he wanted the money to pay debts.

105 int. And when he got that money he would clear her up and lay her at the wharf free from incumbrances?

A. That she would receive freight there, and I would commence to pay my *pro rata* of the expenses of the boat.

106 int. Did Captain Thorwegan state what amount of debts the boat owed at that time?

A. No, sir.

107 int. He didn't state the amount?

A. No, sir; nothing at all.

108 int. The only debts you were interested in were a lot of

72 claims against the boat, and you didn't care what Thorwegan owed in the company, did you?

Objected to by plaintiff's counsel.

109 int. I say these were the only debts you were interested in, were they not?

A. Which?

110 int. The liens and claims against the boat?

A. I didn't know that there was any debts against her.

111 int. Captain Thorwegan told you, didn't he, that the boat would be tied up; that he couldn't get out unless he had some money?

A. He told me that.

112 int. Then you knew, of course?

A. And I let him have $5,000.

113 int. Didn't he tell you the same thing—that he still owed debts when you gave him the $5,000?

A. I don't remember.

114 int. I think you said you gave him $7,000?

A. I did; but that was to help clear her up.

115 int. What did Captain Thorwegan say was his reason for wanting to get $7,000 from you?

A. He said he would sell to me one-eighth of the boat.

116 int. I ask what was his object in getting the other $7,000 from you?

A. I don't know what he done with it.

73 117 int. I don't ask what he did with it, but what did he say he wanted it for?

A. I think he said that this was to pay up the debts the boat owed.

118 int. Exactly, he wanted it to pay up the debts——

A. That he owed.

119 int. Did he tell you, then, if he got this money he would pay the debts?

A. I don't know what he said on that subject. He said he wanted the money to pay, or I think he said he wanted the money to pay, the debts that he owed on the boat.

120 int. And promised you that he would pay these debts, did he, out of this money?

A. I didn't ask him that question.

121 int. Did you consider the boat to be worth the amount you paid for her—one-eighth?

A. Well, I think the boat was worth, if she had business, she was worth the money; well worth it, if she had business to do, but without business she wasn't worth four bits; if she had business she was worth the money, every dollar—$100,000; she didn't appear to have done anything up to that time, and I would say the boat was worth $100,000.

74 122 int. You went away before she was turned into a stock company?

A. I think I did, sir.

123 int. Did you ever, after you paid this money, make any examination of the books of the boat?

A. I never looked at one of them at all.

124 int. Did you ever ask to do that?

A. No, I am no accountant anyway, and couldn't tell, if I had looked at them, how they were.

125 int. You could understand the explanations made by the clerk, couldn't you?

A. I didn't have anything to do with the boat from the time I bought into her.

126 int. How long did you remain here after you paid the $7,000?

A. A few days; I don't know exactly how long.

127 int. Do you know what the debts of the boat were at that time, of your own knowledge—the lien debts of the boat?

A. No, sir; I didn't know anything about them at all.

128 int. Did you ever inquire how much debts she owed at that time?

A. No, sir.

129 int. You never made any inquiries?

A. No, sir; not that I remember.

75 130 int. Did you ever receive any statement of the amount of the debts she owed at that time?

A. No, sir; all the papers I have got are here, I think.

131 int. Was the boat repairing at the time you loaned Thorwegan the money? I understood you to say she was being painted.

A. I think she was painting—being fitted up near the chimneys, or something or other; they were at work on her.

132 int. Did you ever inquire about the expenses or cost of these repairs?

A. No, sir; I had nothing to do with the repairs—the boat to be delivered to me clear of all incumbrances for my interest on leaving St. Louis.

133 int. What was said about this stock; that you wanted her turned into a stock company; what was said about that?

A. Just as I told you. What way do you mean?

134 int. Well, what did you say? You agreed among yourselves that she should be turned into a stock company. Now, what was said about your stock?

A. Said about what?

135 int. Well, I am just asking you what was said about the stock. I want to know.

76 A. I don't know what was said.

136 int. What was said on the general subject of turning this boat into a stock company was what was said between you and Thorwegan. Did this conversation take place after you let him have the money?

A. No, sir; I think it was done when Mr. Day was present.

137. Was that after or before you let him have any money?

A. That was when I gave him the last money.

138 int. Then, when you gave him the last money you concluded she should be turned into a stock company; you and Thorwegan agreed she should be turned into a stock company?

A. Yes.

139 int. What was said about that; did you agree as to the amount of stock she should represent?

A. $100,000.

140 int. That was agreed on?

A. Yes, sir.

141 int. Was it ever talked over or stated what was the value of the boat at that time?

A. No, sir; I don't remember that it was; I don't remember about any value, except that she was valued at $100,000, and there was put in so much stock.

77 142 int. She was to be valued in the stock company at

$100,000, but was anything said about any further value than that of her being of greater value than that?

A. No, sir; I don't remember anything at all; I though that was the full value of her.

143 int. And then the understanding was, that Thorwegan was to take steps to have her put in a stock company, and deliver you the one-eighth you had paid for?

A. Day was attending to that for me.

144 int. But I say the understanding was that Thorwegan was to put her into a stock company?

A. I left the matter in the hands of Mr. Day, which I paid him for.

145 int. She was to be put into a stock company, and you were to get your one-eighth interest in full paid stock?

A. Yes, sir; I got that.

146 int. Now, did you ever try to sell that stock before the destruction of the boat?

A. No, sir.

147 int. Did you ever offer it to anybody?

A. Never.

148 int. Did you ever make any inquiry about the value of the stock?

A. No, sir.

78 149 int. Do you know whether there was any value to it, or what its market value was?

A. I never heard it had any value.

150 int. You never heard of any being sold?

A. No, sir.

151 int. The stock might have had a market value or not as far as you know?

A. I don't know anything about the value of the stock.

152 int. I mean the market value, what it would sell for on the market; do you know what that stock was worth the day before the boat burned?

Q. Do you know what was the value of the boat when she burned? About, sir.

A. No, sir; I do not.

153 int. When you were here in July, before she burned up, did you have any talk with Captain Thorwegan?

A. Well, I saw him; I went down to the boat once with him, saw him in the hotel here once or twice.

154 int. Did you ask him to show you the books of the boat?

A. They gave me this statement at that time.

155 int. He told you the books were open, and told you to examine if you wanted to?

79 They gave me this balance sheet, as the clerk called it at that time.

156 int. Do you know whether Captain Thorwegan ever realized anything out of his boat; of your own knowledge, do you know

whether he ever realized anything out of this boat, or that he got anything out of it that belonged to you?

Plaintiff's counsel objected to the question, as immaterial.

A. I can't say, because I never had an opportunity of knowing what they done with everything; I never was consulted on any subject. When the boat was burned they made away with what was left—with her boilers, etc.; put some of them in another boat; her machinery and everything; they took everything; I don't know what was done with it; I was like the poor boy at the frolic, *i. e.*, laying out in [the] cold.

157 int. Do you know what was done with them after the boat burned?

A. I do not.

158 int. Do you know whether they were taken possession of by the underwriters and sold?

Plaintiff's counsel objected to the question, as immaterial.

A. I don't know.

159 int. Do you mean to say that Captain Thorwegan made away with everything that was left?

80 A. I can't say who made away with it.

160 int. You don't know that?

A. No, sir.

161 int. You don't know what became of the stuff that was left?

A. They made away with it; that is all I know.

162 int. Do you mean to say Captain Thorwegan made away with it?

A. I don't know who made away with it; I don't know who got it; I don't know anything about it.

163 int. That remark you don't intend as evidence?

A. No, sir.

164 int. When you came here in July, don't you remember they told you you could come and look at the books of the boat, if you chose; that they were open to you inspection?

A. No.

165 int. Don't you recollect Mittenburger told you that?

A. I don't remember anything about it.

166 int. It might be so and you not recollect it, mightn't it?

A. I don't know; I don't remember anything of the kind; it might have been possible; he might have said so; I don't say positive he didn't say so.

167 int. Do you know how much insurance was carried on

81 that boat during the time they were running her?

A. I don't know.

168 int. Don't you know she was laid up, previous to the last repairing, when she was burned? Previous to her burning there was $30,000 insurance which run out.

Objected to, as immaterial.

A. I do not.

169 int. As I understand, you testify in your examination-in-chief that Thorwegan promised that he would pay off the debts due by the boat and all the demands against her?

A. Yes, sir.

170 int. And you relied on that promise?

A. I did.

171 int. And on that you let him have your money?

A. Yes, sir.

172 int. That's the way of it?

A. Yes, sir.

173 int. You didn't care about an interest in this boat particularly, but you wanted to help Thorwegan more than anything else, that was your motive?

A. That was the motive; I saw he was in trouble, as he stated to me.

82 Re-examination by Mr. KINNEY:

174 int. When Mr. Thorwegan got the $7,000, did he state to you that would pay all the debts against the boat?

Objected to, as leading and suggestive.

A. I can't say; I don't recollect positive, he did agree to pay all the debts; I don't know whether it was at that time or not.

175 int. State further if Captain Thorwegan agreed to pay all the expenses and repairs going on in the boat at that time you mentioned in October or September, 1876?

A. Yes, sir; he did.

176 int. State whether or not Captain Thorwegan told you at that time, the time you let him have the last $7,000 when the boat left, she would be free of all debts, liens, and incumbrances.

Objected to, as leading.

A. I don't remember of it being at that time.

177 int. Well, at any time?

A. He did; he stated that three or four times.

By Mr. CAMPBELL: You mean when he said that three or four times that he promised to do it?

A. That he promised to do it.

83 By Mr. KINNEY: You stated in your cross-examination that you didn't remember of Miltenberger or Captain Thorwegan asking you to go down and look over the books; if they did, state it; why didn't you go down and look over the books; was it because you relied on their representations that the boat was free and clear of debts?

Objected to.

A. I wouldn't have known the books any way much.

179 int. At that time, in October, 1876, you placed full reliance

on their representations that the boat was free and clear of all debts, didn't you?

A. I did; that she was turned over me clear of all debts due and demands up to that date. It was not on the first of October; the boat was to be turned over to me when she was at the wharf, ready for receiving cargo. That was the understanding, and the captain will state that fact himself.

180 int. How many times were you in St. Louis between October 1, 1876, and October, 1877, if at all?

A. I came up, I think, about the first of January, 1877, for
84 a few day[s], and returned home.

181 int. Were you here again between that and October, 1877?

A. I was here just before that boat burned; that was in July or August; I can't recollect the exact date.

182 int. How long did you remain on these occasions in St. Louis—about how long, as near as you can approximate?

A. The first time I came up I came expecting to get some money from Powers and Buckle, and they met me, and I didn't get my money.

183 int. Did you see Captain Thorwegan on that occasion?

A. I don't remember whether I did or not; I don't think he was here, but I don't know.

184 int. Did you see him when you were here in July or August, 1877?

A. Yes, and I was on board the boat with him?

185 int. Did anything occur between you and Captain Thorwegan as to the indebtedness of the boat at that time?

A. I don't remember anything about it particularly; they were talking, but I didn't pay much attention to it.

186 int. Did they furnish you a statement from time to
85 time in regard to the condition of that boat, from October, 1876, to the time she was burned?

A. They did, that is a copy of it, there.

187 int. Where are these statements?

A. I think at my ranche.

188 int. Did any of those statements show the indebtedness of the boat?

Objected to.

A. None that I know of; there is the copy of them; they made a statement of the trip to me, and that is a copy of them.

Objection renewed.

189 int. If you had known there was $75,000 indebtedness against that boat in October, 1876, would you have put $12,000 into her for an eighth interest?

A. No, sir, I wouldn't have put anything in her.

By Mr. CAMPBELL: When was the boat to be brought to the wharf, after you paid the $7,000, after she was painted?

A. I don't know what time; I can't state that; it was to be done.

190 int. It was to be done after she was finished and repaired?

A I wouldn't suppose the boat would [be] fetched to receive a cargo until after she was finished.

191 int. How long did Captain Thorwegan say before she would be finished?

86 Objected to, as immaterial.

A. I can't state; but they were pretty near through with repairing when I left home.

192 int. A few days.

A. I can't say exactly.

193 int. How long did you remain in St. Louis after the first of October?

A. I can't state, sir.

194 int. Were you here on the first of October?

A. I think I was.

195 int. Do you remember the agreement that is set out in the original petition filed by you in this case: "This agreement made and entered into the first day of October, A. D. 1876, between William H. Thorwegan, of the city of St. Louis, and Richard King, of Corpus Christi, Texas, witnesseth: That whereas the said King has purchased from the said Thorwegan one-eighth interest in the steamer Grand Republic, for which he is to receive an eighth of the capital stock of a coporation to be organized for the purpose of purchasing said steamer; and as I have agreed, as a part of the terms of said purchase, that I will keep and make said steamer free of all incumbrances up to this day: Now, therefore, said

87 Thorwegan agrees with said King that he will hold said King harmless from all claims and incumbrances existing on said steamer at the date above written; and I hereby agree to pay all claims and incumbrances existing on said steamer on the first day of October, 1876, as well as all maritime and other liens, so that no part thereof as against him shall be chargeable or paid by the said new company.

In witness hereof, I have set my hand seal on the day first above written.

[SEAL.] (Signed) WILLIAM H. THROWEGAN.

Do you recollect that agreement?

Objected to.

196 int. Was that written agreement between you and Thorwegan drawn up before you left here?

What date is it?

197 int. It is dated on the first of October.

A. I was here on the first day of October.

198 int. Do you remember having this written agreement in your possession; not this paper, but the one of which this is a copy?

A. I don't really remember; I am not positive.

199 int. Did you ever see such an agreement as that?

A. Mr. Day wrote the agreement.

200 int. Did you ever see the agreement Day wrote?

A. If he wrote it on the first of October I must have seen it, because I was here then.

88 201 int. Have you any recollection of such an agreement as that?

Objected to.

A. I know we had an agreement.

202 int. When you spoke of Thorwegan agreeing to do this, you referred to this agreement?

Objected to.

A. He always told me this with his own mouth.

203 int. And it was put in writing afterwards?

A. I suppose it was.

204 int. And this is the written agreement?

A. If I had a copy here I could tell.

205 int. I wish to know if you recognize this as a copy of the paper which Mr. Day prepared for you?

A. I can't say positive about it at all.

Plaintiff's counsel renewed the objections to the foregoing questions and answers relating to the agreement.

206 int. Do you recollect he did have an agreement of that kind drawn up?

89 A. I think there was some agreement; of course there must have been.

207 int. You don't recollect whether that is a copy of the agreement you received from Capt. Thorwegan at that time, or not?

A. I do not.

208 int. But you know you did receive and agreement from him in writing?

A. I think so; I know there was a paper written.

209 int. And the purport of that paper was to keep your interest in the boat free from incumbrances, was it not?

Objected to.

A. I don't know; I got whatever the paper states; the face of it will show for itself.

210 int. You got the bill of sale from Thorwegan?

A. Well, I don't think I ever did, that I know of; Mr. Day may have got the bill of sale, but I don't remember that I ever got any.

211 int. Day was your authorized representative here, was he not?

A. He was attending to this particular business for me.

212 int. He had your power of attorney for that purpose?

A. He was attending to it; I don't know whether he had a power of attorney or not.

90 213 int. But you authorized him to attend to it?

A. Yes, sir.

214 int. That is Mr. Day, the lawyer here—Melville C. Day, is it not?

A. I don't know his full name; I think Mr. Hough is the man who named him to me as being a very good young man.

Signature waived.

I, L. L. Walbridge, a notary public within and for the city of St. Louis, State of Missouri, hereby certify that the foregoing deposition of Richard King was then and there, at the time and place mentioned in the caption of this deposition, reduced to writing by me in short-hand, by consent of parties to said cause, who where respectively represented by counsel at the taking of said deposition, and that it was then and there agreed that my transcript of said short-hand notes might be read in evidence in the trial of said cause, with the same force and effect, to all intents and purposes, as if the said transcript has been signed by said deponent.

I further certify that the foregoing is a true and faithful transcript of said deposition so taken.

Given at St. Louis, this 10th of September, A. D. 1879.

[SEAL.] L. L. WALBRIDGE,
Notary Public, City of St. Louis.

91 EXHIBIT A.

Shares $100 each.

No. 6. Grand Republic Transportation Company. 125 shares.

It is hereby certified that Richard King [is] entitled to one hundred and twenty-five shares, of one hundred dollars each, of the capital stock of the Grand Republic Transportation Company.

This said Richard King shall have and enjoy all the rights and privileges to which said one hundred and twenty-five shares of stock entitle him under the charter of said company, and transferable only on the books of said company in person or by attorney on surrender of this certificate.

No dividends will be paid, except on presentation of this certificate, and only then when all dues to the company are paid.

Signed and sealed by the president and secretary, at their office in St. Louis, Missouri, this 24[th] day of October, 1876.

[SEAL.] WM. H. THORWEGAN, *President.*
PETER A. O'NEIAL, *Secretary.*

And endorsed on back: R. King, per J. W. Hulse, att'y-in-fact. Filed July 13, 1878. M. M. Price, cl'k.

92

EXHIBIT B.

Statement of Losses and Gains, Steamer "Grand Republic," from November 9th, 1875, to May 27th, 1877, as rendered by George Miltenburger, Clerk.

		Losses.	Gains.
1876.			
Nov. 9	Trip No. 5, Oct. 23 to Nov. 9, 18 days		$3,140 04
Nov. 22	" " 6, Nov. 10 to Nov. 22, 13 days		1,493 18
Dec. 6	" " 7, Nov. 23 to Dec. 6, 14 days		1,949 95
Dec. 23	" " 8, Dec. 7 to Dec. 23, 17 days		1,734 83
77.			
Jan'y 11	" " 9, Dec. 24 to Jan'y 11, 19 days		267 32
Feb'y 1	" " 10, Jan'y 12 to Feb'y 1, 21 days		3,312 33
Feb'y 15	" " 11, Feb'y 2 to Feb'y 15, 14 days		158 04
Feb'y 28	" " 12, Feb'y 16 to Feb'y 28, 13 days		750 09
M'ch 10	" " 13, M'ch 1 to M'ch 10, 10 days	$3,498 65	
April 6	" " 14, M'ch 11 to April 6, 27 days		5,501 52
May 27	" " 15, April 7 to May 27, 51 days		1,884 60
			$20,241 88
	Losses deducted		3,495 65
	Net gain from Oct. 23 to May 27, 1877		$16,746 23

EXHIBIT C.—*Statements. Trips 1 to 16, inclusive.*

From, to—	No.	Freight.	Passage.	Bar rent.	Excursions.	Average.	M'd'se.	Loss and damage.	Totals.	Fuel.	Stores.	Expense.	Labor.	Loss and damage.	Wages.	M'd's.	Totals.	Gains.	Losses.
1876.																			
April 15	1	$10,454 89	$5,035 90	$250 00	.....	.....	.....	.....	$15,740 79	$3,207 68	$2,576 26	$2,519 80	$1,277 11	.....	$3,718 41	.....	$13,299 26	$2,441 53	
May 11																			
May 12	2	10,376 37	5,137 95	208 33	.....	.....	.....	.....	15,722 65	2,403 57	1,411 03	1,788 95	1,117 60	.....	2,992 25	.....	9,713 40	6,009 25	
June 7																			
June 8	3	11,857 16	2,606 80	175 00	.....	.....	.....	.....	14,638 96	2,214 05	1,290 51	1,906 44	1,372 79	.....	2,742 40	.....	9,526 19	5,112 77	
June 26																			
June 27	4	15,136 83	3,754 85	106 47	.....	.....	.....	.....	18,998 15	2,542 52	1,436 74	2,753 99	1,511 94	.....	4,237 35	.....	12,482 54	6,515 61	
Aug. 14																			
*July 22																			
Oct. 23	5	10,601 05	1,217 50	123 50	.....	.....	.....	.....	11,942 05	1,131 70	1,382 36	2,375 00	1,240 75	$112 70	2,509 50	.....	8,752 01	3,190 04	
Nov. 9																			
Nov. 10	6	8,004 11	380 50	89 05	.....	.....	.....	.....	8,473 66	1,090 36	620 29	933 76	769 14	.....	2,666 95	.....	6,980 50	1,493 16	
Nov. 22																			
Nov. 23	7	9,252 71	800 50	95 90	.....	.....	.....	.....	10,149 11	2,086 30	912 10	1,575 87	834 29	.....	2,830 60	.....	8,299 16	1,849 95	
Dec. 6																			
Dec. 7	8	8,693 90	1,743 30	116 45	.....	.....	.....	.....	10,553 65	2,186 09	1,043 48	1,475 16	855 71	47 02	3,211 45	.....	8,818 82	1,734 83	
Dec. 23																			
1877.																			
Dec. 24	9	8,534 57	860 30	130 15	.....	.....	.....	.....	9,525 02	2,433 55	1,056 05	1,472 49	661 06	.....	3,634 35	.....	9,257 50	267 52	
Ja'y 11																			
1877.																			
Jan'y 12	10	11,879 54	1,096 10	143 85	.....	.....	.....	$403 33	14,122 82	2,708 50	1,242 70	2,734 12	1,165 92	.....	2,869 25	.....	10,810 49	3,312 33	
1 Feb'y																			
Feb'y 2	11	9,167 96	1,864 65	95 90	.....	.....	.....	.....	11,128 51	3,416 60	1,330 58	2,369 53	1,096 36	125 75	2,656 65	.....	10,995 47	133 04	
Feb'y 15																			
Feb'y 16	12	7,737 56	1,808 70	89 05	.....	.....	.....	.....	9,635 31	2,699 28	1,266 35	2,161 09	689 39	25 51	2,043 60	.....	8,885 22	750 09	
Feb'y 28																			
M'ch 1	13	926 38	1,477 75	68 50	.....	.....	.....	.....	2,472 63	2,593 44	595 48	1,105 19	45 50	225 92	1,405 75	.....	5,971 28	.....	3,498 65
Mar. 10																			
M'ch 11	14	12,054 27	3,213 25	157 55	.....	1,742 25	.....	.....	17,167 32	2,903 11	1,864 00	2,613 55	714 60	78 69	3,491 85	.....	11,665 80	5,501 52	
April 6																			
April 7	15	10,874 64	6,433 50	847 37	1,331 00	200 00	.....	.....	19,686 51	2,720 18	2,743 90	4,085 47	590 15	170 56	4,287 40	$265 53	14,873 19	4,813 32	
May 27																			
May 28	16	9,172 61	2,763 90	312 15	391 30	.....	$98 75	.....	12,738 71	2,372 08	1,156 52	2,618 19	415 20	52 06	3,131 70	.....	9,745 75	2,992 96	
July 29																			
		154,724 55	40,795 45	3,909 22	1,722 30	1,942 25	98 75	403 33	202,695 85	39,708 92	21,928 35	34,488 60	14,357 51	838 21	48,489 46	265 53	160,076 57	46,117 92	3,498 65

* This is where R. King comes in as part owner.

RECAPITULATION: Receipts, $202,695.85: Expenditures, $160,076.58: Gains, $42,619.27. Profits, $46,117.92: Losses, $3,498.65: Gains, $42,619.27.

94 EXHIBIT D.

There is a credit of $1,084.39 now in contingent fund, which belongs to W. H. Thorwegan only, as it was deducted off dividends until a certain amount was collected, and no deductions have been made since R. King owned in boat.

There is also an asset in wharf boats which are owned by the pool, and for which was paid $22,000, and the wharf boats have earned up to this time about $3,000 clear of expenses, and are still earning. To sell the wharf boats they will not bring the amount paid for them, as the good will was purchased with them, and were bought to keep out opposition. The boats' proportion of pool and assets is one-fifteenth of whole; this also belongs to Wm. H. Thorwegan only.

You will see by statements on page No. 3 that the earnings by the statements amount to $42,619.27, and no deductions were made in the statements for insurance and amounts paid to pool, as they were paid at different times, and so they are deducted off at the end of season, which leaves a clear gain of $31,727.98.

The profits of trips one to four inclusive belong solely to William H. Thorwegan, as the boat made that many trips before Capt. R. King became an owner, and it amounts to $14,433.82. You will see that I have deducted $5,645.34 loss on pool out of his profits, and leave only deducted out of trips five to sixteen inclusive $2,366.36, making the loss in pool $8,011.70. The reason there is more deducted off the first four trips is there was larger loss, as the contingent fund was taken out, and also the wharf boats were paid for, and I have explained above why the $1,084.39 belongs solely to W. H. Thorwegan, and also the wharf boat stock. In the earnings of wharf boat from Oct. 1st, 1876, Capt. W. H. Thorwegan is entitled to one-fifteenth proportion of same.

The profits of trips five to sixteen inclusive amounts to $17,294.16, and W. H. Thorwegan is entitled to seven-eighths of same, which amounts to $15,132.39, and added to $14,433.82, making his total $29,566.25.

Capt. R. King is entitled to one-eighth of $17,294.16, which amounts to $2,161.77, and both together amount to $31,727.98, the whole profits.

The loss in pool, $8,011.20, is to July 21. There is another dividend due now, but it will not be paid until all the statements are in and accounts made up. This will be divided between W. H. Thorwegan, seven-eighths, and R. King, one-eighth, when collected.

Statement of Net Gains and Losses. Season, 1876 and 1877.

Gains per statements—trips 1 to 16 inclusive		$42,619 27
From which is to be deducted the following items:		
Insurance premium paid	$2,879 59	
Pool ac. now stands us a loss of	8,011 70	
Making the deduction amount to		10,891 29
Leaving a clear gain of		31,727 98
And the profits are divided as follows:		
Profits trips Nos 1 to 4 inclusive, and while boat was owned by W. H. Thorwegan, amounts to	22,079 16	
Deduct loss on pool same time	5,645 34	
Net gains same time		14,433 82
Profits trips 5 to 16 inclusive, and while boat was owned by W. H. Thorwegan, ⅞, and R. King, ⅛, amounts to	26,038 76	
Less loss on trip No. 13	3,498 65	
Gains on trips	22,54011	
From which are to be deducted as follows:		
Insurance premium paid	2 879 59	
Pool ac. loss	2,366 36	
	5,245 95	
Leaving a clear gain of		17.294 16
		31,727 98
Profits are divided as follows:		
W. H. Thorwegan, trips 1 to 4	14,433 82	
" " 5 to 16, ⅞ of $17,294.16	15,132 39	
Profits to credit of W. H. Thorwegan		29,566 21
Captain R. King is entitled to ⅛ of profits on trip 5 to 16 inclusive, which is $17,294.16, which amounts to		2,161 77
Profits of W. H. T. and R. King together amounts to		31,727 98

There has been do deductions made in statements for repairs ac. up to Oct. 23d, 1876. The repairs to that time were paid solely by W. H. Thorwegan. Captain R. King has a credit on boats' books now of $2,161.77, being his proportion of profits.

Respt., GEO. MILTENBURGER, *Clerk.*

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Capt. R. King is entitled to one-eighth of $17,294.16, which amounts to $2,161.77, and both together amount to $31,727.98, the whole profits.

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Statement of Net Gains and Losses. Season, 1876 *and* 1877.

Gains per statements—trips 1 to 16 inclusive			$42,619 27
From which is to be deducted the following items:			
Insurance premium paid	$2,879 59		
Pool ac. now stands us a loss of	8,011 70		
Making the deduction amount to			10,891 29
Leaving a clear gain of			31,727 98
And the profits are divided as follows:			
Profits trips Nos 1 to 4 inclusive, and while boat was owned by W. H. Thorwegan, amounts to	22,079 16		
Deduct loss on pool same time	5,645 34		
Net gains same time			14,433 82
Profits trips 5 to 16 inclusive, and while boat was owned by W. H. Thorwegan, ⅞, and R. King, ⅛, amounts to	26,038 76		
Less loss on trip No. 13	3,498 65		
Gains on trips	22,54011		
From which are to be deducted as follows:			
Insurance premium paid	2 879 59		
Pool ac. loss	2,366 36		
	5,245 95		
Leaving a clear gain of			17,294 16
			31,727 98
Profits are divided as follows:			
W. H. Thorwegan, trips 1 to 4	14,433 82		
" " 5 to 16, ⅞ of $17,294.16	15,132 39		
Profits to credit of W. H. Thorwegan			29,566 21
Captain R. King is entitled to ⅛ of profits on trip 5 to 16 inclusive, which is $17,294.16, which amounts to			2,161 77
Profits of W. H. T. and R. King together amounts to			31,727 98

There has been do deductions made in statements for repairs ac. up to Oct. 23d, 1876. The repairs to that time were paid solely by W. H. Thorwegan. Captain R. King has a credit on boats' books now of $2,161.77, being his proportion of profits.

Respt., GEO. MILTENBURGER, *Clerk.*

95 EXHIBIT E.

R. KING, Esq.

DEAR SIR: The Steamer Grand Republic has done remarkably well in the past season, taking all things in consideration; in the first place we left St. Louis when the river was low and were eleven days going down, and also had a strong opposition against us on 2d trip, the balance of season we had to contend with low water and we lost one trip entirely on account of ice and snow, and so had *had* expenses to pay for that time, but no receipts. On our return to St. Louis we had to lay over from two to four weeks to await our turn to load, and all of this time was very valuable to us, as there was plenty of water in the river, and if we could leave here every three weeks our expenses would decrease considerably. Last season was also one of unusual depression in business, and there was no travel to speak of [—] winter, as people were afraid to go South. The coming season bids fair to be a good one; there is a large crop to go forward, and we are prepared to handle it cheaper and more of it, and will have no opposition to speak of, and think we will also be able to put in more running time in the spring when we return to St. Louis, as pool will break up in April, and as long as we have to wait for turn to load it would be better for us.

Resp., GEO. MILTENBERGER.

96 P. S.—The expenses on various trips included extra repairs or expenses, and were included in statements at times rendered, these expenses were made principally by our engineer, and were made by him in altering engines and repairing same, and were made by him to increase the speed and steam of the boat, and it has increased the speed of the boat at least two days from New Orleans to St. Louis; and consider the money well spent, as by making better time we decrease wages, stores, and other expenses.

Respct., GEO. MILTENBERGER.

			Boat trip.		
1876.					
June 8	To report No. 1, up		1	$995 91	$995 91
July 6	" No. 1, down			$2,354 73	
Do	" No. 2, up		2	1,248 25	3,602 98
July 17	" No. 2, down			$2,450 09	
Do	" No. 3, up		3	979 18	3,429 27
Aug. 11	" No. 3, down			$3,354 78	
Do	" No. 4, up		4	1,145 42	4,500 20
Nov. 30	" No. 4, down		5	$945 96	
1877.					
March 19	" No. 5, up		13	186 20	1,132 61
April 14	" No. 5, down		14	$297 40	
Do	" No. 6, up			82 91	380 31
May 30	" No. 6, down		15	$2,641 48	
Do	" No. 7, up			256 87	2,898 35
July 18	" No. 7, down		16	$2,430 53	
Do	" No. 8, up			363 47	2,794 00
					$19,733 18
		Cr.			
1876.					
Feb'y 20	By dividend No. 1			$2,410 87	
Sept. 23	" No. 2			2,684 16	
Nov. 28	" No. 3			1,099 69	
Dec. 13	" No. 4			441 99	
1877.					
April 16	Howard contingent fund			737 36	
June 2	dividend No. 7			1,924 90	
July 18	" No. 8			2,422 90	
				$11,721 48	
	Loss on pool			8,011 70	$19,733 18

Contingent fund marked "Howard" is an agreement entered into by Howard & Republic for an allowance of one per cent., to be taken out and to be given to boat who paid in the most money, and we got it on the 4 first dividends; we got 9 per cent, and we now get 10 per cent. out of a whole per cent. of 150 parts—equals 1-15.

1876.				
June 8.	Report No. 1, up	$995 91		
July 6.	" No. 1, down	2,354 73		
Do	" No. 2, up	1,248 25		
July 17.	" No. 2, down	2,450 09		
July 17.	" No. 3, up	979 18	$3,028 16	
	Cr.			
July 20.	By dividend No. 1	$2,410 87		
Do	Howard contingent	267 88	2,678 75	$5,349 41
Aug. 11.	Rep't No. 3, down	$3,354 78		
Do	" No. 4, up	1,145 42	$4,500 20	
	Cr.			
Sept. 23.	By dividend No. 2	$2,684 16		
Do	By Howard contingent	298 24		
Nov. 28.	" "	122 18		
Do	Dividend No. 3	1,099 69	4,204 27	295 93
	From this down is loss on pool while R. King owns in boat.			
Nov. 30.	To report No. 4, down		$945 96	
	Cr.			
Dec. 13.	By dividend No. 4	$441 99		
Do	Howard contingent	49 06	566 51	455 30
1877.				
March 19.	Report No. 5, up	$186 20		
April 14.	" No. 5, down	297 40		
Do	" No. 6, up	82 91		
May 30.	" No. 6, down	2,641 43		
Do	" No. 7, up	256 87		
July 18.	" No. 7, down	2,430 53		
Do	" No. 8, up	363 47	$6,258 86	
	Cr.			
June 2.	By dividend No. 7	$1,924 90		
July 18.	" No. 8	2,422 90	4,347 80	1,911 06
				$8,011 70
	Loss on pool by Wm. H. Thorwegan		$5,645 34	
	" " R. King		2,366 36	
			$8,011 70	

98 EXHIBIT "H."

Half-Rate Messages.

The Western Union Telegraph Company require that all messages received for transmission shall be written on the blanks of the company, under and subject to the conditions printed thereon, which conditions have been agreed to by the sender of the following half-rate message:

A. R. BREWER, Sec'y. 20 Ho. WILLIAM ORTON, Pres't.

Dated CORPUS CHRISTI, TEX., *May* 16, 1878.

Received at N. E. Cor. Third and Olive streets, St. Louis, Mo., May 17, 13 P.:

To J. W. HUTZ, *Mechanics' Bank, St. L.:*

Will send you full power attorney to represent me in the Thorwegan matter by mail. In the meantime, go ahead under this wire authority to the fullest extent of the law. Have some law suits here requiring my present personal attention. Will be in your city as soon as these suits come to some determination.

55. Paid. R. KING.

99 Plaintiff also offered in evidence the deposition of George Miltenberger:

UNITED STATES OF AMERICA.

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

Be it remembered that on the 20th day of September, A. D. 1879, I, L. L. Walbridge, a notary public within and for the State and city atoresaid, and duly commissioned and qualified under the laws of the United States to take depositions for use in the circuit courts of the United States, did call and cause to be, and personally appear before me, at the office of Given Campbell, Esq., No. 515 Olive street, in the city of St. Louis, in the said eastern district in the State aforesaid, George Miltenberger, to testify and the truth to say on the part and behalf of the defendant, in a certain suit or matter of controversy now pending and undetermined in the circuit court of the United States for the eastern district of Missouri, at St. Louis, in the district aforesaid, wherein Richard M. King is plaintiff and William H. Thorwegan is defendant.

Deposition of George Miltenberger.

And the said George Miltenberger, of lawful age and sound mind, having been by me first carefully examined, cautioned,
100 and duly sworn to tell the truth, the whole truth, and nothing but the truth touching the matter in controversy, did thereupon depose, testify, and say, as follows:

Direct examination by GIVEN CAMPBELL, Esq., for the defendant:

1 interrogatory. What is your business?

Answer. Clerk on the river.

2 int. Are you acquainted with the parties to this suit?

A. Yes, sir.

3 int. How long have you known them?

A. I have known Mr. King about two years by acquaintance; I first saw him about three years ago; he was pointed out to me.

4 int. Did you ever know the steamboat Grand Republic?

A. Yes, sir.

5 int. Did you ever have any connection with that boat?

A. Yes, sir; I was clerk on her; went on her in October.

6 int. Do you know when she was built?

A. Only from what I saw in the papers.

7 int. Did you see her when she was being built?

A. I saw her hull; the timbers of her hull laid down; that is all.

8 int. About what time was that?

A. In August, 1876.

101 9 int. Do you know what became of that boat?

A. Yes, sir; she was burned at the wharf in St. Louis.

10 int. When?

A. On September 20, or the night of the 19th, at 11 o'clock, 1877.

11 int. Do you know what was the reasonable fair value of that boat; I do not mean her cash value at forced sale, but do you know what was the reasonable, fair value of that boat at the time she burned?

Counsel for the plaintiff objected to the question, as incompetent and immaterial.

A. The accounts on the books show that she cost $160,000, and I consider that she was worth every dollar of that.

Counsel for the plaintiff objected to the answer, as irrelevant.

12 int. Are you familiar with steamboats and steamboat property?

A. Yes, sir.

13 int. How long have you been in the river business?

A. Sixteen years.

14 int. What would you say was the fair value of that boat from your knowledge of her at the time she burned, regardless of the cost of building?

Counsel objected to the question, as incompetent.

102 A. She was worth $175,000 in the St. Louis trade, and if she had had a place in the Vicksburg trade, she would have

been worth $200,000; that is a more lucrative trade, the Vicksburg trade, than the St. Louis trade.

15 int. The capital stock of the corporation was $100,000, I believe?

A. Yes, sir.

16 int. She belonged to the Grand Republic Transportation Company, did she not?

A. Yes, sir.

Counsel for the plaintiff objected to this method of examination, as leading and suggestive.

17 int. Mr. Miltenberger, what was the actual value of the stock of that corporation; I do not mean the market value, but the actual value of the stock of that corporation before that boat was burned?

Objected to, as incompetent.

A. Well, there had not been any stock sold; it [was] worth par, but there was no stock sold that I know of.

18 int. Do you know why there was not a larger amount of insurance on her?

Objected to, as leading and incompetent.

A. The boat was laid up repairing, and didn't consider the risk very dangerous; then it was very expensive carrying so much
103 insurance, and didn't have money to pay for it; there was to have been $30,000 insurance taken out the next day or the day before she burned.

Answer objected to, as irresponsive to the question.

The Witness. That would have been about all the insurance we could have got.

19 int. How much insurance was on her at the time she burned?

A. $52,750; $2,500 of that was in a company that was in liquidation and considered worthless; never realized a cent from it.

20 int. What company was that?

A. The Commercial, of St. Louis.

21 int. That company is not yet wound up, is it?

A. No, sir; it is not finally settled.

22 int. You don't know what it will amount to, do you?

A. No, sir; we count it as nothing, but they say there is a prospect that we may get something some day.

Cross-examination by B. KINNEY for plaintiff:

23 int. When did you first become acquainted with the steamer Grand Republic?

A. In October, 1875.

24 int. I mean the boat that burned; was that the Great or Grand Republic?

104 A. The Grand Republic; there was a clerk on her prior to me; I did not take charge until October, 1875.

By Mr. CAMPBELL: Do you mean 1875 or 1876?

A. It was in October, 1876.

25 int. How long did you remain on her?

A. I was clerk on her till she burned.

25 int. What were your duties as clerk of that boat?

A. I received the cash and paid out the cash, and collected the bills, paid the notes, and kept the books and accounts.

26 int. Can you state what became of those books, and where they are?

A. Yes, sir; I have the books at home.

27 int. Can you produce them?

A. Yes, sir.

23 int. What books are they?

A. The cash book, ledger, and journal; the vouchers and bills were all destroyed by fire.

29 int. I wish to ask if you did not swear on an examination in bankruptcy that all these books except one were burned up in the fire in that boat?

A. No, sir; I did not.

30 int. You so now swear, do you?

A. Yes, sir.

31 int. State, if you please, how you get at the value of a steam boat.

105 A. By bills which was paid on the boat at a low valuation; that the men that built the boat lost money on their contracts.

32 int. Where are those bills?

A. The bills were destroyed by fire.

33 int. And you only speak from memory as to the cost of the boat?

A. No, sir; I speak from the books.

33 int. Can you produce the bills?

A. I can produce the amounts and who they were paid to; the bills can be got at; duplicates made.

34 int. You only speak from your memory of the bills, do you?

A. I speak from the books of the boat, the exact amounts; not from memory at all.

35 int. You have not the books before you, have you?

A. No, sir, but I have had them before me.

36 int. Then you are only testifying as to your recollection of the facts stated on the books?

A. Yes, but it is correct.

37 int. Is that the only means you have of ascertaining the valuation of that boat?

A. No, sir; my own judgment will tell me that.

38 int. State, if you please, how you form your judgment in regard to the value of a boat.

106 A. By being in that business and making a living at that.

39 int. I would like to ask you if you can form a fair estimate of the value of a boat lying on the water, and with which you are not connected in any way?

A. Well, that would be a hard question to answer. I could by the draft of the boat, the size of the boat, the machinery, and everything; in that way you could form an idea.

40 int. Can you give the size of the Grand Republic?

A. Yes, sir.

41 int. State it, please.

A. She was 350 feet long, 52 feet floor, and carrying capacity 3,300 tons. She was not an expensive boat. She had very valuable machinery in her; had two cylinders 56 inches and two 26 by 30; she had compound engines—what they called the Hadopee compound engines; get great power out of them at small cost.

42 int. Do you know the cost of those engines?

A. I guess altogether they must have cost $75,000.

42 int. You are guessing now?

A. No, sir—well, yes, I am guessing; but I am pretty
107 certain that they did cost that.

44 int. Will you swear that they did cost that?

A. I would hardly like to swear to it, but I am certain that they did cost that.

45 int. Are you as certain of that fact as any to which you have sworn?

A. Yes, sir. That includes repairs on engines and perfecting them. I do not mean that they originally cost that much.

46 int. Now state just what you do mean, please.

A. I mean that I suppose the engines cost, I should judge, from $40,000 to $50,000, and $25,000 was spent on them to make them a success.

47 int. Then you were mistaken when you said they cost $75,000?

A. With repairs.

48 int. What repairs were they?

A. Perfecting the engines, I told you.

50 int. Were the engines an experiment, and put in the boat as such?

A. Well, they were considered as an experiment at that time.

51 int. Anything in that boat going to make its cost or value as stated by you?

A. The contract for the hull was $60,000, and the dock company, I have heard, lost $16,000 on the contract.

108 52 int. You need not state that; you state the contract with the Dock Company for the hull was $60,000?

A. Yes, sir.

53 int. Anything else going to make up the value of that boat as stated by you?

A. Yes, sir; she was the finest and largest boat that ever was built on any river.

54 int. Anything else Mr. Miltenberger?

A. She was built cheap at the time.

55 int. Is that all you can give, Mr. Miltenberger, from which you set the cost of that boat, the price fixed in your direct examination, and from which you judge the value of that boat now?

A. The boat with the trade would be a very profitable boat for anybody.

56 int. I wish an answer to my question, (last question read.)

A. That and what she cost.

56 int. Do you know who owned that boat, Mr. Miltenberger?

A. When?

57 int. October first, 1876?

A. She was owned by William H. Thorwegan and Mr. Schulenberg; I don't think the transportation company was formed at that time.

58 int. Did they own her jointly, do you know, or relatively what interest?

109 A. They owned her jointly; I didn't know at that time that Schulenberg was interested in the boat.

59 int. What connection, if any, did you have with the Grand Republic Transportation Company?

A. I was a director, held one share of stock.

60 int. What position did you occupy on the boat after the formation of that company, in October, 1876?

A. Clerk for the Transportation Company.

61 int. Did you have charge of the books, cash, and such things?

A. Yes, sir.

62 int. Did you keep the books?

A. I didn't keep the Transportation Company's books; I kept the books of the boat.

63 int. What is the difference between the Transportation Company's books and the books of the boat?

A. We had a secretary here, and if I had had any business for the company, I would have had to turn it over to him.

64 int. Who owned the boat at that time, Mr. Miltenberger?

A. At the time of the Transportation Company?

65 int. Yes.

A. The Transportation Company.

66 int. Were not the books of the boat the books of the Transportation Company?

110 A. They are separate books.

67 int. How did that happen?

A. The Transportation Company never had any business to do except to keep the minutes and records. That was done to comply with the law.

68 int. What became of the books of the Grand Republic Transportation Company?

A. You have them in your possession; at least I gave them to Mr. Hulse.

69 int. Now the books to which you have refered in your testi-

mony heretofore are not the books of the Grand Republic Transportation Company, as I understand you?

A. The books of the steamer Grand Republic.

70 int. The Grand Republic Transportation Company had no books?

A. They are really the property, of course, of the Transportation Company, but they are used on the boat, and I had no Transportation Company's account on the books.

71 int. Do you know anything about the accounts of the Grand Republic Transportation Company?

A. No, sir.

72 int. You stated in your direct examination that there was $52,750 insurance on the boat.

A. Yes, sir.

111 74 int. Do you know anything about any insurance that was on the boat over and above that $52,750?

A. No, sir; there could not be any.

76 int. Which was assigned to William J. Lewis as security for a loan?

A. That included that.

77 int. How much was that?

A. $5,000. There was two other parties had, also, insurance transferred to them.

78 int. When did you first meet the plaintiff, Captain King?

A. I think it was during the summer of 1876.

79 int. Where?

A. At the Lindell Hotel.

80 int. What were the circumstances under which you met him at that time?

A. I was introduced to him, and he was told that I was clerk of the boat. That was the first time.

81 int. Do you remember who introduced you?

A. Capt. Thorwegan.

82 int. I desire to call your attention to Exhibit "C," connected with the deposition of Richard King in this case.

(Examines.) Yes, sir; that is my statement.

Q. Is it in your writing?

A. Yes, sir.

84 int. State, if you please, how you formed and made this statement.

112 A. That is a statement or receipts and expenses of trips—running expenses.

85 int. What else?

A. That is all.

86 int. Earnings?

A. No, sir; running expenses and the receipts.

87 int. State, if you please, how you made that statement.

A. I made that statement from the books.

88 int. Can you state about when you made it?

A. During the summer of 1877.

89 int. Are you positive of the fact?

A. Yes, sir.

90 int. That she made sixteen trips up to the summer of 1877?

A. Yes, sir.

91 int. Isn't that a statement of all the trips that that boat made up to the time she burned?

A. That is a supplementary statement.

92 int. The statement is correct, is it; you drew it off the books?

A. Yes, sir.

93 int. State what the net earnings of that boat was from your statement—the sixteen trips made by her.

A. From which statement?

94 int. That before you.

A. That shows $42,619.27, but a good deal of that time we were in a pool here, and we paid out money all the time, but we counted the receipts same as if they had not paid out anything for
113 the pool, because we were receiving benefits from the pool all the time, and did not know how the final outcome would be till the pool was all wound up.

95 int. Look at your statement marked Exhibit D, attached to deposition of Richard King, in this case?

A. (Examines.) Yes, sir.

96 int. Is that in your handwriting?

A. Yes, sir.

97 int. State about what time you made that.

A. Same as the other.

98 int. About September, 1877?

A. Yes, sir.

99 int. After the sixteen trips had been made by the boat?

A. Yes, sir; it was after the sixteen trips were made.

100 int. State what that shows, if anything, to the credit of Captain King in the possession of the Grand Republic Transportation Company at that time?

A. It shows a credit of $2,161.77.

101 int. Is that statement correct, taken from the books *of the of the books?*

A. Yes, sir.

102 int. You referred to the pool account; I desire to call your attention to Exhibit "F."

A. Yes, sir.

103 int. State, if you please, how that account stood at the
114 time the boat burned, in regard to profit and loss.

A. It stood at a loss of $8,011.70, none of which was included in the statement. I mean the other exhibit; I don't mean this exhibit.

104 int. Do you find that charge to be, in your statement to Mr. King, a charge against him when he had a balance to his credit of $2,161.70 on the books of the boat?

A. I don't understand it that way at all, Mr. King owned in the boat. The loss on the pool was $2,366.36; that is all that is charged against him; him and Thorwegan together.

105 int. That is charged to him in his statement, and deducted from his profits on the boat, leaving him a balance of $2,161.77.

A. His one-eighth of it; yes.

106 int. Then that was taken into account in this statement rendered to Mr. King?

A. Yes, sir.

By Mr. CAMPBELL: Which statement?

A. This statement; Exhibit "D."

By Mr. KINNEY: You say this statement was drawn from the books?

A. Yes, sir.

107 int. I desire to call your attention to Exhibit "E," attached to the deposition of Mr. King.

A. Yes, sir.

115 109 int. The facts stated in these are true, are they not?

A. Yes, sir.

Counsel for the defendant objected to the introduction of Exhibit E, as incompetent.

110 int. I desire to call your attention to the statement of the pool again. In pooling the profits, were the net profits of each trip paid over to the pool or merely a statement rendered?

A. Merely a statement rendered.

112 int. Did the books show a direct credit to Capt. King of that $2,161?

A. Yes, sir.

113 int. And a dividend credited to each particular stockholder of the Grand Republic Transportation Company?

A. That I can't say.

114 int. How did you happen to make this dividend to Capt. King if you were not a bookkeeper for the transportation company?

A. Mr. King wanted his account to stand on the boat's books just the way that it was at that time; he didn't care about the money.

115 int. You still make a distinction between the boat's books and the books of the corporation, do you?

A. Yes, sir.

116 int. I desire to call your attention to Exhibit "G" attached to Capt. King's deposition.

116 A. Yes, sir.

117 int. Do you recognize that book?

A. Yes, sir.

118 int. State what it is.

A. It is the transportation company's book, minute book of the meeting of business.

119 int. State, if you please, if you were present at the meeting held in St. Louis by the Grand Republic Transportation Company, October 17, 1877.

A. Yes, sir.

120 int. State if at that time, or about that time, you became trustee for the Grand Republic Transportation Company.

A. Yes, sir.

121 int. State what you did as such trustee.

Objected to, as the subject-matter is irrelevant and incompetent.

A. I collected what money I could, and paid it out to the different creditors of the transportation company.

122 int. State whether or not the books show a correct statement of the indebtedness of the boat at the time she burned.

A. It is very near correct; there ain't much difference.

123 int. Is it more or less?

A. Very little more; it is correct in the main amounts, $78,000 and something.

Book objected to, as incompetent.

124 int. Is it also a correct statement of the assets as you found them as trustee of the Grand Republic Transportation Com-
117 pany?

A. Yes, sir; the valuation of two pictures is put in at $1,100, and I sold them for $160.

125 int. I desire you to state if you know how the indebtedness of $78,000 accrued against the Grand Republic Transportation Company.

A. Notes and accounts payable.

126 int. What for?

A. For building account principally; some of them was borrowed money; some of them was supplies, some wages.

127 int. How long had this $78,000 of indebtedness been due against this boat?

A. Well, some of it had been running along; they had just spent about $18,000 on it just before she burned.

128 int. Can you tell me what indebtedness was against that boat October 1, 1876?

Mr. CAMPBELL: You mean the boat or the corporation?

Mr. KINNEY: Against the boat.

A. Between sixty and seventy thousand dollars—$68,000, I believe.

129 int. In October of 1876?

A. Yes, sir.

130 [int.] I desire to ask you if these statements, Exhibits "C," Exhibits D, and Exhibit F, show a correct condition of that boat at the time they were rendered to Capt. King, in September, 1877, by you?

118 A. They did not include the repairs and insurance.

131 int. Can you state why?

A. Because I didn't know that Mr. King had anything to do with the insurance.

132 int. Mr. Miltenberger, I desire you to say how it is that this statement shows a net profit of all the trips made of that boat of $42,619.27, and that there was $78,000 of indebtedness against her when she burned; explain that fact, please.

A. The statement shows the profit of running expenses of $42,000, but there is insurance to come out of that, and repairs and interest on notes, when the boat finally burned she was six or seven thousand dollars ahead after paying off repairs and everything. What else was the question?

Question repeated.

A. That is just $20,000 on her that ought to be here. The Transportation Company had borrowed various sums of money from different parties, that was a liability of the Transportation Company.

133 int. Now state, if you please, why all these items were not included in these statements?

A. Why they were not included?

134 int. Yes; I wish to know why you didn't make out a
119 correct statement when you were making one?

A. Because I didn't know that Mr. King had anything to do with that.

135 int. Didn't you know that Capt. King was an owner in the boat and transportation company?

A. Yes, an owner in the transportation company.

136 int. Then don't you think he had something to do with it?

A. Yes, sir.

137 int. Then why didn't you include those items in the statement rendered to Capt. King when you furnished them as copies of the books?

A. He didn't want them, he only wanted to know how the boat was doing.

138 int. You swear to that?

A. Yes, sir.

139 int. Did he tell you that?

A. No, sir; he didn't tell me that.

Counsel objected to the answer.

A. Capt. Thorwegan told me what to do and what to make out.

140 int. Who told you?

A. Capt. Thorwegan told me he wanted a statement made out, and I made it out.

141 int. He told you how he wanted it made out?

120 A. No, sir; he had no more to say about the books than you.

142 int. What did he tell you?

A. He told me that Mr. King wanted a statement to know how he stood, and I made it out.

143 int. Now, you swear he didn't stand the way your statements show it?

A. No, I do not.

144 int. Then you swear that your statements did not show all the indebtedness of the boat; that it had borrowed money and incurred indebtedness not stated in that statement?

A. This was after this statement was made; I say this was after this statement was made.

145 int. Referring to notes given, not included in this statement, were they given by the Transportation Company, or by Capt. Thorwegan?

A. Both.

146 int. Who ordered the dividend to be made of the earnings of that boat among the stockholders?

A. They never made any dividend.

147 int. Do you remember your testimony at the examination in bankruptcy proceedings against William H. Thorwegan?

A. I suppose so; I don't know.

148 int. I desire you to state, if you didn't swear on that
121 examination that the indebtedness existing against the steamer Grand Republic, in September, 1876, was not over $70,000.

A. Yes, sir.

149 int. Was that testimony correct at that time, Mr. Miltenberger?

A. Yes, sir.

150 int. Now, Mr. Miltenberger, if the boat's earnings, clear of her expenses, including repairs, and everything connected with it during sixteen trips made by her, where did this indebtedness of $78,000 against the steamer, when she was burned come from; I wish to get at that fact?

A. As I told you, the boat netted only about $7,000, and she had spent $20,000.

151 int. When?

A. After she laid up; after the sixteen trips were made.

152 int. What does your statement, Exhibit "C," show, Mr. Miltenberger?

A. It shows for itself.

153 int. Now, then, what is the receipts during the sixteen trips, all the trips made by that boat, according to your statement?

A. According to that statement it is over $200,000.

154 int. Now what was the expenditure?

A. According to the statement, $160,000.

155 int. Is the statement correct?

122 A. As far as it goes, yes.

156 int. Then, it is not a whole statement; it is not a statement from the boat's books I mean.

A. It is not a statement to include insurance, interest, and everything else; it only includes running expenses.

157 int. What do you understand by net earnings, as made on that Exhibit "C," Mr. Miltenberger?

A. Running expenses, it is just a memorandum, don't show nothing at all, just memorandums.

158 int. Now, haven't you already sworn in your testimony, that that was a correct statement from the books of the boat at the time it was rendered?

A. What is running expenses? Yes, every item on there is correct.

159 int. What other expenses were there?

A. Interest, insurance, and repairs.

160 int. How much did they amount to?

A. $20,000 in round numbers.

161 int. Now, I desire to refer to your testimony again in the bankruptcy proceedings; I wish you to state whether or not you did not swear upon your examination as witness in the bankruptcy proceedings of William H. Thorwegan, the interest and repairs, and all outstanding expenditures not included in that state-
123 ment, were about $16,000, and not over that sum?

A. If I swore to it at that time it was correct.

162 int. Did you swear to it?

A. Well, I can't remember, I suppose it was so.

163 int. Now, I desire to ask you how this indebtedness of $78,000 against the Grand Republic Transportation Company accrued, and when?

A. A good deal of it accrued while we were laid up that summer.

164 int. How much of it?

A. Over $20,000.

165 int. I desire to ask again if you did not swear at the time of the examination in the bankruptcy proceedings of Thorwegan, that over $60,000 of this indebtedness of $78,000 was an old indebtedness that existed from the time the boat was built.

A. I don't remember.

166 int. If you so swore, was it correct?

A. If I understood the question it was.

167 int. Did you see Capt. King at the time you rendered those statements to him?

A. Yes, sir.

168 int. State, if you please, what passed at that interview, if anything.

A. Mr. King said he just wanted to know how he stood, his interest.

124 169 int. You gave him this statement and told him that was the way he stood, did you?

A. Yes; my understanding was——

170 int. Never mind your understanding; you need not state that.

A. My understanding was that Capt. Thorwegan was to pay all the repairs, insurance, and interest, and everything, and Mr. King was going to stand in the boat net.

Objected to by plaintiff's counsel.

A. The reason none of these items were charged to Mr. King was, that was my understanding of it, that Capt. Thorwegan was to pay insurance, interest, and first repairs up to October, 1876, when she went to the Transportation Company; and the repairs that were put on in 1877, Mr. King knew all about it, and knew we had spent a heap of money, and mentioned at the time he didn't care about the $2,100, and Capt. and myself told him we didn't have it, and he said he didn't care anything about that, he just wanted it to appear right on the books.

171 int. Where did you get your understanding as stated?

A. From Capt. Thorwegan.

Mr. KINNEY. I desire to object to all the preceeding answers
125 and statements of the witness, as incompetent, and entirely voluntary on his part, without cause or provocation.

172 int. Did you say anything to Capt. King at the time you presented the statements?

A. We had some talk.

173 int. Now just state what was said?

A. I don't remember that.

Re-examination by MR. CAMPBELL:

174 int. Mr. Miltenberger, in mentioning what portions of the Grand Republic which you say cost money, you only mentioned the engines and hull; did the cabin cost anything?

A. O, yes; outfit and everything.

175 int. How much was that in your judgment; the cost?

A. I consider the cabin and outfit worth $60,000.

176 int. There were other things about the boat, tackle, and repairs, which you did not mention?

A. No, sir; I have not mentioned that.

177 int. Did they enter into your estimate of the value of the boat, those things, cabin, outfit, tackle, and repairs and furniture?

A. Yes, sir; everything.

178 int. In whose name was the boat before she went
126 in the Transportation Company; whose name did she stand in on the record?

A. William H. Thorwegan.

179 int. After Capt. Thorwegan had sold this boat to the Transportation Company, did you keep an account with him?

A. Yes, sir.

180 int. Now, will you state whether he was overdrawn, or how.

Objected to, as incompetent.

181 int. How did his account stand afterwards during the time he was in the Transportation Company?

A. His account stood, that the boat owed him.

182 int. I don't mean the exact amount.

A. A good many thousand dollars.

183 int. Did he put in any money after she went into the Transportation Company in excess of what he received from the company?

Objected to, as incompetent.

A. Yes, sir.

184 int. How much?

A. I should suppose about $10,000 or $15,000; probably more than that.

185 int. For what purpose was the money paid to him by you when you paid him money after——

Objected to.

A. Why, to pay bills with.

186 int. Do you know whether he paid the bills?

127 A. Yes; he returned them to me and I gave him credit.

187 int. Returned what?

A. Notes and everything.

188 int. Receipt and vouchers?

Objected to.

A. Yes, sir.

189 int. Then, as I understand, your statement is that he paid in near $20,000 more than he got out after she was a corporation?

Objected to, as leading and suggestive.

A. Yes, sir.

190 int. I will ask you whether Capt. Thorwegan paid anything into that corporation over and above what he received out of it; if so, how much?

Objected to, as incompetent and suggestive.

A. A great many thousand dollars.

191 int. Can you come near it?

A. I guess over $10,000.

192 int. Now I will ask you how many lien debts the steamboat Grand Republic owed when she was changed into a corporation—the amount of liens?

Objected to, as incompetent, suggestive, and leading.

A. She owed about ten thousand dollars liens, if you don't include the building account.

193 int. Outside of the building account.

A. About $10,000.

128 194 int. When you speak of the boat owing, at the time

she went into the Transportation Company, about $70,000, do you mean she owed that amount of lien debts at that time?

Objected to, as incompetent.

A. It included the building account, with notes accepted, about that; that is no lien on the boat.

195 int. I ask whether you meant in that $70,000 that she owed, $70,000 debts for which there was a lien against the boat?

A. No, sir; they could not have tied her up for that.

196 int. What do you mean in that answer?

Objected to.

A. Accounts settled by note; a good many of them.

197 int. What kind of accounts?

A. For building hull, machinery, &c.

198 int. Whose notes were out for that; do you know?

Objected to, as incompetent.

A. William H. Thorwegan's.

199 int. Did Mr. King have access to the books of tde corporation?

A. I was ready to show them to him any time he wanted.

Objected to.

129 200 int. Do you know whether he had access to the steamboat's books?

A. If he desired to.

201 int. Do you know wether any invitation was extended to him in relation to the matter?

A. Yes, sir.

202 int. What was it; go on and tell about it?

A. When the statement was handed to him he was told to come down and look at anything he wanted to, and he said he didn't care anything about that.

203 int. On the books.

A. On the books; yes.

204 int. When you made out these statements you made them out under the direction of Capt. Thorwegan, I believe?

A. Yes; he told me to make them out, that is all; he had nothing to do with them.

205 int. What did he tell you?

A. To make out a statement to show how Mr. King stood with the boat at that time.

206 int. He gave you no further directions?

A. None at all.

207 int. This Statement C, as I understand you, it is a statement of the trip of the boat, the running expenses of the boat?

Objected to.

130 A. Yes, sir.

208 int. During those trips?

A. Yes, sir.

209 int. Does that contain any outstanding debts contracted by the boat for repairs, fuel, or anything of the kind during that time that is not paid?

A. No, sir.

210 int. It is only cash expenditures and receipts?

A. It is the cash and what we owed too; it is just a memorandum.

211 int. But were there any repairs or debts contracted those 16 trips not mentioned there?

A. No, sir. Well, there was debts contracted, that is if you include stores and fuel.

212 int. That is what I mean.

A. Well, there were a great number of them.

213 int. That is what I mean.

A. O, yes.

Plaintiff objected to counsel telling the witness what he desires him to swear to.

WITNESS: I don't know as he told me anything; if I understand what his questions are, I have answered them.

214 int. I wish to know if during those 16 trips you had got down on the debit side of that boat, all the debts contracted by that boat during that time which were paid or not paid, all of them?

131 A. I have on the books, yes, sir.

215 int. I mean on that statement?

A. No, sir.

216 int. Then it don't show them all?

A. No, indeed, this don't show anything, it is only a memorandum; it is no full statement.

217 int. Now can you tell why you rendered that partial statement in that shape to Mr. King?

A. I explained it before, that I did not understand Mr. King was to pay any of the interest and first repairs that had been put on, and they were not included in those expenditures at all.

218 int. Why didn't you include the outstanding fuel bills in there on the trips; did you pay cash for the fuel you got in that time?

A. No, sir.

219 int. Is it charged in that account there?

A. The amount is charged, though it never was paid.

220. int. It is charged as paid?

A. No, sir; they never were paid.

221 int. Does it appear in that account?

A. The amounts do, you do not exactly understand how this was. This thing is only a statement of our expenses would have

132 been if we had paid them, and this is a statement of the receipts if they had received everything in the pool; we were running right along, and paying part of the old bills and making

new ones, but that trip a good deal of the fuel was not paid at all, because we owed one man $20,000; that is only just memorandums, don't account for anything at all.

222 int. Let me ask one question. Suppose at the time this——

Counsel objects to suppositions.

223. Suppose at the time this account was opened here on the 15th of April, 1876, you were not required to pay anything on old debts—I don't mean insurance—squaring up you account on both sides, collecting what you made, and paying off debts made during that time, including insurance, would your gain amount to $42,619.27?

A. No, sir.

Objected to, as leading, incompetent, and suggestive.

224 int. What would they amount to?

A. A clear gain of $31,729.98; that includes nothing paid for interest in that time; the insurance premium was $2,800, and I think there was some other came in right afterwards that I have not got.

225 int. When was this statement rendered, Exhibit D?

133 A. This statement was rendered in 1877 some where.

226 int. This amount, $31,729?

A. Yes, sir.

227 int. Now, how much debts were contracted after that in running the boat, insurance, repairs, and other things?

A. They did not run after that.

228 int. The lying up wages, debts, and other things?

A. Over $20,000.

229 int. That $20,000 to show the condition of the boat would have to be deducted from the $31,000.

A. Yes, sir, and some interest besides.

230 int. Any insurance come into it?

A. Yes, there is some little insurance; about six or seven hundred dollars, probably more.

231 int. Now, I will ask do these statements, Exhibits B, C, D, and F, exhibit truly and honestly the condition of the boat at that time, taken altogether?

A. They don't show any liabilities at all; they showed what the thing would have been if everything had been cash.

232 int. I mean assuming these debits on this side to have been paid in cash.

A. Yes, sir.

233 int. Is it correct then?

A. Yes, sir.

133½ 234 int. Taking them altogether.

A. Yes, sir.

235 int. Do you know anything about transaction between Captain Thorwegan and Mr. King?

A. No, sir; only what Capt. Thorwegan told me.

236 int. Did Capt. Thorwegan, at any time, ever give you instruction to withhold any information from Mr. King in relation to this boat?

Objected to, as incompetent.

A. No, sir, not at all; he told me to tell him everything that I knew; I wrote to him regularly.

237 int. Wrote to whom?

A. To Mr. King.

238 int. Who directed you to write to him?

A. Well, I wrote to him and signed the Captain's name; the Captain told me to write to him and sign his name.

239 int. Did he read the letters?

A. Yes, after they were written.

240 int. Will you state whether those letters were correct or not.

Objected to, as incompetent.

A. Yes, sir.

241 int. Did you ever say anything or get any directions from Capt. Thorwegan in respect to writing those letters which you say you wrote to Mr. King to give a partial or unfair statement or inaccurate account of the affairs of the boat to Mr. King?

134

Objected to, as incompetent and irrelevant, leading and suggestive.

A. No, sir.

242 int. Do you know anything about the circumstances of his getting any money from Mr. King, of your own knowledge?

A. Only what he told me; I was not present at the time when it occurred.

243 int. Do you know whether Capt. Thorwegan, on his individual account after this transportation company was formed, ever made any efforts to raise money to pay her old indebtedness or old building account?

A. Yes, sir.

Objected to.

244 int. What did he do that you know of?

A. He borrowed from friends right along; about $12,000 from one man.

245 int. What did he do with the money?

A. Put it into the boat.

246 int. After the Transportation Company?

A. Yes; afterward she came into the Transportation Company.

247 int. Was it delivered to the Transportation Company?

A. Yes, sir.

248 int. Any money from anybody else?

A. Yes, sir.

135 249 int. Who?

A. He got money from Mr. Schulenberg.

250 int. After the Transportation Company?

A. Yes, he got only a small amount from him.

251 int. I mean after the formation of the Transportation Company.

A. Yes, sir.

252 int. What did he do with it?

A. Paid bills with it.

253 int. What bills?

A. Money he got from him was paid to laborers and carpenters.

254 int. On the boat?

A. Yes.

255 int. This $12,000, who did he get that from?

A. From George Higby.

256 int. What was done with that?

A. All used up paying bills and notes; indebtedness of the boat.

257 int. Building account?

A. Yes, sir.

Re-cross-examination by MR. KINNEY:

258 int. You state that the fuel account, as stated in these statements, was not paid?

A. There is no account paid there, except labor, loss and damage and wages, they are the only accounts that is cash.

259 int. State whether or not the expenses of all of them as embraced in this statement were paid by the Grand Republic Transportation Company?

136

A. I don't understand what you mean by that.

(Question repeated.)

A. It was a liability, some of them were paid and some were not.

260 int. If they were not paid, would not the net profits or gains have been greater than they are?

A. No, sir.

261 int. Then do I understand you to say this statement includes indebtedness incurred by the Grand Republic Transportation Company?

A. Yes, that includes it—some of it.

262 int. Can you tell what became of the $202,095.85 earned by the Grand Republic Transportation Company up to the time she burned?

A. Yes, sir.

263 int. State it.

A. The books will show where it was paid out—the cash book.

263 int. I am asking you, you say you can do it, I desire now to know?

A. Paid out to different parties different bills and accounts.

265 int. I desire to ask you if the expenses incurred by the Grand Republic Transportation, as shown in this statement, were

137 paid out of the earnings of $202,698.85 according to this statement?

A. Some were and some were not.

266 int. Now what became of the money that didn't go to pay expenses as set out in that statement?

A. They were notes paid, building accounts, repairs, and interest.

267 int. Then, if the money earned by the boat, $202,695.85, was not paid out as stated in this statement, the gains would have been as much larger as the money remaining on hand and not paid out?

A. No, sir; not five cents difference more.

268 int. Then the statement includes the indebtedness against the boat?

269 int. It includes cash and indebtedness paid on those trips, the running expenses; well, it don't include the indebtedness against the boat, because there was an indebtedness of sixty odd thousand dollars before this statement was made?

270 int. I understood you said there was $70,000.

A. You did not understand it.

271 int. Indeed I did; you said $70,000 indebtedness against the boat in September, 1876, didn't you?

A. Yes, sir.

138 272 int. Now that statement shows an earning of $202,695.85?

A. No, sir; it shows receipts of that amount.

273 int. It also shows expenses of about $160,076.58, doesn't it?

A. Running expenses, yes.

274 int. Now I wish to know whether that statement is correct?

A. That statement is correct as far as it goes.

275 int. Then it is not a whole statement.

A. No, sir.

276 int. It is not a correct statement?

A. It is a correct statement.

277 int. Can you state what this indebtedness of $20,000 was incurred for, not included in that statement?

A. Alterations to the boat.

278 int. What kind?

A. Boilers were lengthened four feet, new one put in, guards cut off, and painted.

279 int. Didn't you swear in your re-examination that this statement was correct?

A. Yes, sir.

280 int. Now you further stated that Capt. Thorwegan borrowed $12,000 frem George Higby?

A. Yes, sir.

281 int. What did he do with that money?

A. He paid bills and notes with it.

139 282 int. What bills and notes?

A. Building account liens; that is, open accounts and store bills.

283 int. How much money did he get from Otto Schulenberg?

A. I don't remember; the books show that.

284 int. How is it you happen to remember the $12,000 from Higby and not remember the amount from Mr. Schulenberg?

A. Well, it is natural to remember amounts like that.

285 int. Those are all the amounts you can remember, are they?

A. No, sir.

286 int. What other ones can you remember?

A. He got some money from C. S. Alvord.

287 int. How much?

A. I don't remember now.

288 int. Did he get any from anybody else?

A. He got $750 from Mr. Geo. B. Lee; he got $6,000 from Mr. Perrit; he got that [of] Perrit's before the Transportation Company.

289 int. I only want what he got after the Transportation Company was formed.

A. He got $1,200 from me after she was formed a Transportation Company.

290 int. What became of all this money?

A. Used in paying off old bills.

291 int. Now, I desire to ask you if this $12,000 from Higby, and this amount from Schulenberg, and this $1,200 from yourself,
140 and this amount from Alvord, this $750 from Lee, all went into paying the debts of the boat, why the earnings of the boat or receipts are not greater in excess than they are of the expenses?

A. That had nothing to do with it.

292 int. Now I desire to ask you if you did not swear on the examination of Thorwegan in bankruptcy that the boat earned about $200,000, and that the expenses, including repairs up to the time she burned, made it about even?

A. I suppose I did; it was my impression at the time.

293 int. Now I have tried to get at this fact two or three times; if that is so, the expenses and receipts of the boat were equal, how did it happen the $78,000 of indebtedness accrued against the boat? Explain that; you are the book-keeper.

A. When the boat went into the Transportation Company she owed $70,000; she spent $20,000 more that summer, and she finally quit about $7,000 ahead; I guess that pretty near makes it.

294 int. Will you explain your last answer and state if the boat being indebted $70,000, and then incurring $20,000 more indebtedness, she run the season and quit $7,000 ahead, do you mean that season she earned $97,000?

A. No, I don't mean anything of the kind.

141 295 int. Will you state what you do mean by that answer?

A. The way you ask the question I don't understand what you mean.

(Question repeated.)

A. Deduct $7,000 of the $90,000, make $83,000; what she owed.

296 int. Then you mean that left $83,000 indebtedness against the boat after that season's work?

A. She didn't owe exactly that much; there was $78,000, and there was $5,000 got from Higby that didn't come into the indebtedness at all, because it was a personal matter.

297 int. $5,000 got from Higby, besides the $12,000 referred to before?

A. No, sir; it is included in the total; he was only credited on the books for $5,900 or $6,000; we paid him $500 at one time during the summer; I said the indebtedness of the boat was $70,000, I mean it was about $70,000; $68,000, I believe it was, in round numbers; I can show the whole thing to the day she burned. While Mr. King owned in the boat she made $1,600 odd, Thorwegan and his interest together in the company.

298 int. You stated in that statement, Exhibit C, that the earnings of the boat were $202,000 and over?

A. Yes, sir.

142 299 int. Then you stated that Capt. Thorwegan borrowed $12,000 from George Higby, and a certain amount from Schulenburg, and $1,200 from yourself, $750 from George B. Lea, and a certain amount from Mr. Alvord—all this money went to pay the debts of the boat. Now, as book-keeper, should not, under these circumstances, the indebtedness against the boat have decreased, and the receipts of the boat, or earnings, have been in excess that much more over its liabilities and indebtedness?

A. It just transferred the liability from one man to another; it is still a liability.

300 int. Is that they way of it?

A. Yes; all those parties were creditors of the Grand Republic Transportation Company; they advanced the money to the Transportation Company.

301 int. Then putting this money into the Transportation Company by Capt. Thorwegan was simply changing the indebtedness from one hand to another against the corporation?

A. Yes; part of it.

302 int. As far as it went?

A. I say part of it; Higby only got $5,900 out of the $12,000 against the Transportation Company.

143 303 int. If the money borrowed by Capt. Thorwegan, as stated by you, from yourself and various parties, went to pay old liabilities, and those parties were credited on the books, thereby increasing the total liability, why didn't the $68,000 or $70,000 of the original liabilities show a proportionate decrease, whereas the sum total of liabilities increased by the amount of money borrowed by Capt. Thorwegan from those parties?

A. Didn't we spend $20,000 after we laid up?
304 int. Answer the question in your own way.

(Question repeated.)

A. That money was paid to decrease the $68,000, but it made new liabilities to other people. There were a good many notes out for building account and taken up, but we made other people wait for money instead of paying that.

305 int. Then I desire to come back to the former question. What became of the $202,000 earnings of the boat's 16 trips?

A. The cash-book will show.

306 int. You don't know?

A. Paid out.

307 int. Was it paid out for items of expenses stated in that statement?

A. Only partly.

144 Re-examination by Mr. CAMPBELL:

308 int. Now, how much more money, if any, did Capt. Thorwegan put into that institution after it became a corporation than he took out?

Objected to, as immaterial and a repetition.

A. I don't remember now; I did state awhile ago.

309 int. Was it any considerable amount?

A. I think it was over ten thousand dollars.

310 int. Do you recollect?

A. I do not.

311 int. Have you any memorandum to tell you?

A. Yes; I can tell if you hand me those papers.

312 int. Do you wish to look at these to refresh your memory?

A. Yes, sir.

(Paper shown.)

A. No; I cannot tell by that either; the only way I could tell is by the ledger account, when she went into the Transportation Company the boat owed him $50,000, and when she burned he stood credited with $70,000.

Signature waived.

Certificate of Notary:

I further certify that the foregoing deposition of George Miltenberger was reduced to writing by me in the presence of the
145 deponent in short-hand, at the time and place mentioned in the caption to said deposition, and that it was then and there agreed by the parties to said cause, who were respectively represented by counsel at the taking of said deposition, that my transcript of said short-hand notes might be read in evidence on the trial

of said cause with the same force and effect, to all intents and purposes, as if the same had been subscribed by the said deponent.

I further certify that the foregoing is a true and faithful transcript of said short-hand notes so taken as aforesaid.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, this 24th day of September, 1879.

[SEAL.] L. L. WALBRIDGE,
Notary Public, City of St. Louis.

146 Defendant's counsel objected to the admissibility in evidence of the following part of said deposition, commencing with int. 82 and continuing through all the interrogatories and questions up to int. 123, on the ground of incompetency and irrelevancy, and his objections were overruled by the court and his testimony allowed to be read to the jury.

To which ruling of the court counsel for defendant then and there excepted.

Which said portion of said deposition is in words and figures following, to wit:

147 82 int. I desire to call your attention to Exhibit C, connected with the deposition of Richard King, in this case.

A. (Examines.) Yes, sir; that is my statement.

Q. Is it in your writing?

A. Yes, sir.

84 int. State, if you please, how you formed and made this statement.

A. That is a statement of receipts and expenses of trips—running expenses.

85 int. What else?

A. That is all.

86 int. Earnings?

A. No, sir; running expenses and the receipts.

87 int. State, if you please, how you made that statement.

A. I made that statement from the books.

88 int. Can you state about when you made it?

A. During the summer of 1877.

89 int. Are you positive of that fact?

A. Yes, sir.

90 int. That she made sixteen trips up to the summer of 1877?

A. Yes, sir.

91 int. Isn't that a statement of all the trips that that boat made up to the time she burned?

A. That is a supplementary statement.

148 92 int. The statement is correct, is it; you drew it off the books?

A. Yes, sir.

93 int. State what the earnings of that boat was from your statement, the sixteen trips made by her.

A. From which statement?

94 int. That before you.

A. That shows $42,619.27, but a good deal of that time we were in a pool here, and we paid out money all the time, but we counted the receipts same as if they had not paid out anything for the pool, because we were receiving benefits from the pool all the time, and did not know how the final outcome would be till the pool was all wound up.

95 int. Look at your statement, marked Exhibit I, attached to deposition of Richard King in this case.

A. (Examines.) Yes, sir.

96 int. Is that your handwriting?

A. Yes, sir.

97 int. State about what time you made that.

A. Same as the other.

98 int. About September, 1877?

A. Yes, sir.

99 int. After the sixteen trips had been made by the boat?

A. Yes, sir; it was after the sixteen trips were made.

149 100 int. State what that shows, if anything, to the credit of Captain King in the possession of the Grand Republic Transportation Company at that time.

A. It shows a credit of $2,161.77.

101 int. Is that statement correct, taken from the books of the books?

A. Yes, sir.

102 int. You referred to the pool account; I desire to call your attention to Exhibit "F."

A. Yes, sir.

103 int. State, if you please, how that account stood at the time the boat burned, in regard to profit and loss.

A. It stood at a loss of $8,011.70, none of which was included in the statement—I mean the other exhibit—I don't mean this exhibit.

104 int. Do you find that charge to be, in your statement to Mr. King, a charge against him when he had a balance to his credit of $2,161.70 on the books of the boat?

A. I don't understand it that way at all—Mr. King owned in the boat. The loss on the pool was $2,366.36. That is all that is charged against him, him and Thorwegan together.

105 int. That is charged to him in his statement and de-
150 ducted from his profits on the boat, leaving him a balance of $2,161.77.

A. His one-eighth of it, yes.

106 int. Then that was taken into account in his statement rendered to Mr. King.

A. Yes, sir.

By Mr. CAMPBELL: Which statement?

A. The statement Exhibit D.

By Mr. KINNEY: You say this statement was drawn from the book?

A. Yes, sir.

107 int. I desire to call your attention to Exhibit C, attached to the deposition of Mr. King.

A. Yes, sir.

108 int. That is your writing and name, is it not?

A. Yes, sir.

109 int. The facts stated in there are true, are they not?

A. Yes, sir.

Counsel for the defendant objected to the introduction of exhibit, as incompetent.

110 int. I desire to call your attention to the statement of the pool again. In pooling the profits, were the net profits of each trip paid over, or merely a statement rendered?

A. Merely a statement rendered.

112 int. Did the books show a direct credit to Capt. King of that $2,161?

A. Yes, sir.

151 113 int. And a dividend credited to each particular stockholder of the Grand Republic Transportation Company?

A. That I can't say.

114 int. How did you happen to make this dividend to Capt. King if you were not a book-keeper for the transportation company?

A. Mr. King wanting his accounts to stand on the boat's books just the way that it was at that time; he didn't care about the money.

115 int. You still make a distinction between the boat's books and the books of the corporation, do you?

A. Yes, sir.

116 int. I desire to call your attention to Exhibit G, attached to Capt. King's deposition.

A. Yes, sir.

117 int. Do you recognize that book?

A. Yes, sir.

118 int. State what it is.

A. It is the transportation company's book—minute book of the meetings of business.

119 int. State, if you please, if you were present at the meeting held in St. Louis by the Grand Republic Transportation Company, October 17th, 1877.

A. Yes, sir.

152 120 int. State if at that time, or about that time, you became trustee for the Grand Republic Transportation Company.

A. Yes, sir.

121 int. State what you did as such trustee?

Objected to, as the subject matter is irrelevant and incompetent.

A. I collected what money I could and paid it out to the different creditors of the Transportation Company.

122 int. State whether or not the books show a correct statement of the indebtedness of the boat at the time she burned?

A. It is very near correct; there ain't much difference.

123 int. Is it more or less?

A. Very little more; it is correct in the main amounts, $78,000 and something.

B. KINNEY, being sworn as witness for pl'ff, testified as follows, to wit:

B. Kinney, duly sworn, testified as follows: I desire to state that about the first of July, 1876, as attorney of Captain King; I tendered that $6,125, which was in the Grand Republic Transportation Company, and demanded the return of the $12,000 and interest.

Question by Mr. CAMPBELL: In July, 1876?

Answer. July, 1878.

153 Q. Who did you make the tender to?

A. To Captain Thorwegan, the defendant.

This was all the evidence offered by the plaintiff in support of the issues before the jury.

At the conclusion of the plaintiff's case, the counsel for the defendant demurred to the evidence, and asked the court to give the following instruction in the nature of a demurrer to the evidence:

"The court instructs the jury that, under the pleadings and evidence in this case, the plaintiff is not entitled to recover."

The court refused to give this instruction, and thus overruled the defendant's demurrer to the evidence.

To which ruling of the court, counsel for defendant then and there excepted.

Counsel for defendant offered in evidence the record of the proceedings in bankruptcy in the district court of the United States for the eastern district of Missouri, for the purpose of proving that the plaintiff presented a claim based upon the indebtedness of defendant to him growing out of a contract of indemnity made by the defendant to indemnity plaintiff against any outstanding debts of the steamboat "Grand Republic" existing at the time the

154 plaintiff paid the amount, $12,000, to defendant.

The court excluded this evidence from the jury, on the ground of incompetency and irrelevancy.

Plaintiff offered the same record to show the register's action upon the claim of plaintiff, rejecting it as a valid demand against his estate in bankruptcy.

155 Defendant's counsel produced in evidence certificate of the discharge in bankruptcy of the defendant, William H. Thorwegan.

Discharge in Bankruptcy.

DISTRICT COURT OF THE UNITED STATES, *Eastern District of Missouri,* } *Set.:*

Whereas William H. Thorwegan has been duly adjudged a bankrupt, under the act of Congress establishing a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and the acts amendatory thereof, and appears to have conformed to all the requirements of the law in that behalf: It is therefore ordered by the court that said William H. Thorwegan be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the thirtieth day of October, A. D. eighteen hundred and seventy-seven, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

156 Given under my hand and the seal of the court, at St. Louis, Missouri, in the said district, this twenty-sixth day of July, A. D. eighteen hundred and seventy-eight.

[SEAL.] SAMUEL TREAT, *Judge.*

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *ss:*

I, Joseph H. Clark, clerk of the district court of the United States, for the eastern district of Missouri, hereby certify that William H. Thorwegan was, on his own petition, filed on the thirtieth day of October, A. D. 1877, by the decree of said court, duly adjudged bankrupt, under the act of Congress establishing a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and the acts amendatory thereof, as appears from the record in my office, and that by the decree of said court he was, on the twenty-sixth day of July, A. D. eighteen hundred and seventy-eight, discharged from all debts and claims as stated in the foregoing certificate, as also appears from said record, and that the signature of the Honorable Samuel Treat, judge of said dis-

157 trict court, to said certificate is genuine, and that full faith and credit should be given to all his official acts as such judge.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, the seventy-sixth day of July, eighteen hundred and seventy-eight.

[SEAL.] JOSEPH H. CLARK,
Clerk of said Court.
By T. A. WERNER, *Deputy.*

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *ss:*

I, Joseph H. Clark, clerk of the district court of the United States in and for the Eastern District of Missouri, do hereby certify

the writing hereto annexed to be a true copy of the certificate of discharge in the matter of William H. Thorwegan, bankrupt, in bankruptcy, as fully as the same remains of record in said matter in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 16th day of November, in the year of our Lord eighteen
158 hundred and seventy-eight.

[SEAL.] JOSEPH H. CLARK,
Clerk of said Court.
By WM. J. MORGAN, *Deputy.*

Defendant's counsel then offered in evidence the contract contained and set out in the original petition of plaintiff in this cause, to which evidence the plaintiff's counsel objected, and his objection was overruled, and plaintiff's counsel then and there duly excepted, and same was read to the jury.

Contract.

"This agreement, made and entered into this first day of October, 1876, between William H. Thorwegan, of the city of St. Louis, and Richard King, of Corpus Christi, Texas, witnesseth: That whereas said King has purchased from me, the said Thorwegan, an one-eighth interest in the steamer Grand Republic, for which he is to receive one-eighth of the capital stock of a corporation to be organized for the purpose of purchasing said steamer, and as I have agreed
159 as a part of the terms of said purchase, that I will keep and make the said steamer free and clear of all incumbrances up to this date—

Now, therefore, the said Thorwegan hereby covenants and agrees with the said King that he will hold the said King harmless from all claims, incumbrances, and liabilities existing on said steamer at the date above written; and I hereby agree to pay all claims and incumbrances existing on said steamer on the first day of October, 1876, as well as all maritime and other liens, so that no part thereof, as against him, shall be chargeable or paid by the said new company.

In witness whereof, I have hereunto set my hand and seal, as of the date just above written.

WM. H. THORWEGAN. [SEAL.]

161 Counsel for def't then produced and swore, as a witness in said cause, the defendant, Wm. H. Thorwegan, who testified as follows, to wit:

WILLIAM H. THORWEGAN, being duly sworn, testified as follows:

Direct examination, by Mr. CAMPBELL:

Question. You are the defendant in this case?
Answer. Yes, sir.

Q. Do you know the plaintiff?
A. Yes, sir.
Q. Did you ever get any money from him for any consideration?
A. Yes, sir.
Q. Tell the jury all about it.

Mr. KINNEY: I prefer that you put the interrogatories.
The COURT: That is proper.

Mr. CAMPBELL: Did you ever borrow any money from Richard King?
A. Yes, sir.
Q. When was that—the first time?

Objected to; objection overruled.

A. I think it was in 1876, somewhere.
Q. What was the first amount you borrowed from him?
A. $5,000.
Q. Under what circumstances was that loaned?
A. To pay insurance.

Q. Just tell the conversation that took place between you
162 and Capt. King at the time, in relation to this loan of $5,000.

A. Mr. King. I met him on Walnut street. A man was done some work for me that had done some work for Mr. King. He had been working for me. He had given him some money, and I had been on the boat on Sunday morning—might have been between 12 and 1 o'clock. I met him on Walnut street, between Main and Olive, and this gentleman introduced me to him. I don't remember now, but he is from Pittsburg. I met Mr. King, as stated before, on Walnut street, between Main and Olive.
Q. About what time?
A. Somewhere in the morning. It might have been from 11 to 1 o'clock.
Q. What time of the year, and what year?
A. In 1876.
Q. What month?
A. I don't remember.
Q. Well, go on.
A. He introduced me to him, and we got to talking about the boat, and he finally spoke to me about buying a little wharf boat, and he wanted me to go and look at it with him.

163 Objected to.

Mr. CAMPBELL: It is only to show how he became acquainted. Just state it as it was.
WITNESS: Mr. King asked me to go to Carondelet to look at this boat. It was a little iron boat, that belonged to Chouteau, Harrison & Valle, that he wanted to purchase for some river. He also came and looked at the "Republic." As we got better ac-

quainted, I finally told him that I had considerable opposition in building the boat.

Q. What did you tell him about your condition?

A. I told him I had considerable opposition in building the boat, and that parties here tried to use everything against me to keep me from building the boat, and that if I had any paper in the bank, it would be thrown out, and so on; and he then told me: "I will give you some money"—or I said everything to him. I told him about my insurance, and he says: "About how much will you need?" and I says: "About $5,000."

Q. What did you tell him you wanted to do with it?

A. To pay insurance notes.

164 Q. Well, go on.

A. I met him—we met three or four days or a week after I first met him. He then gave me $5,000, and I stated what I had to do with it, that I had to pay those insurance notes, and then afterwards I might have renewed them, but I didn't know it at the time, and I didn't ask for a renewal, and hadn't asked for a renewal, and so King gave me $5,000, which he asked no note for, and I didn't give him any. At that time he was at the hotel and we were boarding there together. After that, it was months after that, I think it might have been two or three months, I spoke to him about it, that he had better take an interest in the boat, that he got better acquainted with her, and thought her a fine business boat, and that she would make money. And I then said to him that he could have—that I would like to sell him about one-eighth or one-quarter of the boat; that I had from $16,000 to $18,000 of money in bills payable—all had to be about $17,000, out on bills payable, and says I, "There will be no trouble for me to protect the

165 running account, but that paper is out, that is pressing me, and I have to pay it."

Q. How much did you say you had out?

A. From $15,000 to $17,000 that was pressing me—the bills payable.

Q. You told him the running expenses that you could protect those?

A. Yes, with the boat, I then owed King the $5,000—and I said to him that I would like to sell him an interest in the boat, and he then held on for a few days, and finally bought an interest in the boat and gave $12,000 for one-eighth interest. At that time she was owned by myself and Schulenberg. The boat was in my name at the time I sold him the one-eighth for $12,000, and I said to him the boat was in debt. He didn't want to know. I suppose he had confidence in me, that I would treat him just and right, I then gave him this one-eighth interest, made out a bill of sale, and he finally changed it, thought he would put it in his brother-in-law's name. As the boat was incumbered he didn't want it in his name

166 on account, he said, that he had been in boats before, that made him liable for the entire business, and then there was some

papers afterwards destroyed, I think that Day drew up that were made the bill of sale made out to him.

Objected to.

WITNESS (continuing): Whether they were in favor of his son-in-law or himself I don't know. At any rate he didn't want it known that he owned an interest in the boat. He wanted me to keep it secret, for fear on account of the boats' liability they might jump on him for the indebtedness, and then at his suggestion she was turned into a stock company, and I said to King, when he advanced this money, plainly—and took the one-eighth interest—that I would hold his interest harmless from all indebtedness, which could have been done, but unfortunately the boat was lost, and I lost everything that I had in her. I kept nothing out of the boat.

Mr. KINNEY: You need not state that.

A. I want to tell these gentlemen that I got nothing out of the boat; I didn't have a dollar. There was the money that I had my hands on and could have taken.

167 Mr. Kinney, counsel for plaintiff, objected.

WITNESS: Why, they say I got money; I never got a cent; I turned over all my effects and went into bankruptcy; I didn't get a cent, and I took my wife's jewelry and put it up, and you accuse me of being a thief, and I will hold you (pointing to Mr. Kinney) accountable for it before you get through. I have been a citizen of this town and I have never been accused of this before.

(At this point the witness was overcome by his emotions.)

The COURT (to the witness): When a man has lost his money they only want to know where it has gone; that is all; you give an account of the matter and it will be all right.

WITNESS: Well, this man accused me on the street once; he said I had the money, and he is a liar; he didn't know I had the money and he came to me with those documents.

Mr. KINNEY: I desire the court to caution the witness to give his testimony and not abuse me.

WITNESS: All right; you will get all you want, and I will settle with you too.

168 Q. Did you ever make any representation to Mr. King as to the amount of the indebtedness of this boat at the time you got this loan of $7,000?

A. He never asked for it; I was willing to show him at any time; I wanted him to come down and look at the boat's books and affairs, and he didn't want to see it.

Q. Did you ever tell King at any time that the boat didn't owe over $12,000?

Objected to.

Q. Did you ever tell King at the time you got this money that the boat didn't owe over $12,000?

Objected to.

A. No, sir.

Q. Did you ever tell Mr. King at the time you got this $7,000 from him that the boat owed any particular amount of money?

Objected to.

Q. State what you said in reference to the indebtedness of the boat?

A. There was nothing said in regard to the indebtedness of the boat; he knew the boat was in debt; I told him; I told him of the bills payable, $17,000, and that the running account, I could
169 manage that; he didn't ask about our running expenses; he understood what the running account of a steamboat was.

Q. Did he know anything practically about the running of the boat?

A. He told me that he had run boats, and was running boats in Texas; and I told him that there was no trouble to carry the running expenses.

Q. What did he understand about the running expenses?

A. The running expenses is the bills—open accounts.

Q. Did you explain to him what the running expenses were?

A. No, sir; I didn't; he didn't ask it; he loaned the money to me on honor; he had every confidence in me, and now to say that I ever tried to defraud him out of anything; I don't deny anything that he gave me; I don't deny that he should have the money, but unfortunately I lost it, and still this man accuses me of having it, and I haven't got a dollar.

Q. Did you ever make a representation to Mr. King as to the condition of that steamboat as regards its indebtedness?

A. No, sir.

Q. None at all?

169½ A. I wanted him to come and look at the books, and gave him a copy of the account in the presence of Mr. Miltenberger, and told him——

Q. I mean at the time you got the $7,000 from him.

A. Did I what?

Q. Did you ever make any representation to him of any kind as to the amount of the indebtedness of this boat at time you borrowed the $7,000?

A. No, sir.

Q. Are you certain of that?

A. I was willing to make an open showing of the indebtedness, and so on, but he didn't want to see it.

Q. This contract that has been read to the jury, do you remember anything about that?

A. I don't remember now just what it is.

Q. This agreement held King harmless?

A. Yes; I recollect that an agreement was drawn up between us.

Q. Tell the jury at whose instance this agreement was drawn up.
A. I think it was drawn up at mine.
Q. At your instance?
A Yes, sir.
170 Q. How did that agreement happen to be drawn up?

Objected to.

Q. At whose instance was it drawn up?
A. I recollect the agreement was drawn up; that I was to hold Mr. King harmless [objected to] from any indebtedness with my $\frac{7}{8}$ interest of the boat. He had $\frac{1}{8}$ interest and I $\frac{7}{8}$ interest, and I agreed to hold him, if the boat made money, whatever she made he was to get his money; that is, he had nothing to do with the indebtedness up to October 1st, 1876. He had nothing to do with the old indebtedness of the boat. That I carried, as I have said before, but unfortunately I lost the boat and could not pay it, and had to go into bankruptty.
Q. What was the value of that boat?
A. I don't think she could have been built for $225,000; could not be built for that to-day, I don't think.
Q. At the time you sold an eighth interest to King, what did you consider her worth?

Objected to.

A. $200,000.
171 Q. What was the value of the stock, actual value, not market value, but actual value of the stock of that boat at the time she was burned?
A. Well, at the time she was put into the Transporation Co.——

Objected to.

The COURT: I think it is immaterial.
WITNESS: Mr. King was familiar with the boat's business, as well as I; he knew how the boat stood.

Q. What was the value of the stock of that boat at the time she was put in the Transportation Company?
A. We put her in here at $100,000; I didn't put her in at $100,000, but it was done more to keep the taxes down, and everything of the kind; it was not that the boat was not worth more than she was put in at $100,000, but it was on account of the taxes, to keep them down, and there was no necessity anyway; there were only three stockholders in the boat; there was no necessity of putting an actual valuation on the boat; the boat stood me over $200,000—take the actual cost of the boat—and I sold her to him to get out of debt; I was to sell
172 him half the boat; he was talking about buying half of the boat, and he went to Chicago just before she burned.
Q. Do you know what was the amount of your indebtedness for the building account of that boat at the time she burned—not at the

time she burned, but I mean at the time you sold to King this one-eighth?

A. I don't remember now what it was.

Q. What was the total indebtedness—your total indebtedness—as an owner of that boat, on account of that boat, at that time?

A. Well, the total indebtedness, I think, was somewhere about $60,000.

Q. As I understand you, you agreed to let——

WITNESS: I never had anything to do with the books, no more than any gentleman in this room; I never handled a dollar; Mr. Schulenberg was my partner in the boat.

Q. Did you put in any money after she came into the Transportation Co.

A. Yes, sir.

Q. More than you took out?

A. Yes, sir.

Q. How much?

173 A. I don't know; I have a good deal of money paid in, had to protect my paper; whenever I needed money I had to borrow it and raise it.

Q. On whose credit did you borrow it?

A. On my own.

Q. Did I understand you to testify——

Objected to.

Q. Did I understand you to say that at the time King bought into this boat that you agreed to hold him harmless against the debts then existing?

Objected to; objection sustained.

Q. What was the arrangement?

A. The arrangement was that he had one-eighth of the boat for $12,000; the indebtedness then was against the entire boat up to October 1st, 1876; I was to carry; if it paid him $50,000, or if she made $8,000, King was to get one-eighth; any repair account that was after October 1st was to be paid out of the boat as she made money.

Cross-examination by Mr. KINNEY:

COUNSEL: Captain, sit down; take a chair and rest yourself.

WITNESS: I had just as soon stand.

174 Q. Captain, did you ever at any time tell Capt. King, or did you tell him on the 1st of October, 1876, or prior thereto, that there was any indebtedness against the Grand Republic above the $17,000 that you speak of?

A. Yes, sir.

Q. What did you say to him about that?

A. I told him that we had our running expenses, and that we could carry them.

Q. You told him there was $15,000 or $17,000 of bills payable that you had to have the money for?
A. Yes, sir.
Q. Did you say anything further to him about any indebtedness?
A. No, sir; he didn't ask it.
Q. How long have you been in the river business?
A. I have been on the river since 1850.
Q. Did you ever engage in any other business than that?
A. Yes, sir.
Q. What?
A. In the liquor business.
Q. Anything else?
A. I kept a saloon here.
Q. And what else?
A. I had no other business.
Q. What is that?

175 Objected to.

A. I done nothing else.
Q. I desire to ask you if you didn't, in 1868 and 1869, run a gambling house in this city?
A. Not that I know of, 1868 and 1869.

Objected to.

The COURT: It goes as to his credibility?
The WITNESS: Yes; I was interested in a gambling house.
Q. What kind of a gambling house was it?
A. It was what they call a keno house.
Q. Were you ever interested in any faro bank?
A. I never had any faro bank.
Q. Or a poker room?
A. No, sir.
Q. What kind of a house did you keep on Fourth and Walnut or Fourth and Elm?
A. Fourth and Elm?
Q. Fourth and the alley between Market and Walnut; what kind of a house was that?
A. A liquor and keno house.
Q. And a poker room?
A. No; no special poker room.
Q. State, if you please, if you are not a professional sporting man.
A. No, sir; no more than you are.

176 Don't you go to horse races and bet on the races?
A. I may do that sometimes.
Q. You went to Kentucky to the big horse race there recently and bet there, didn't you?
A. No, sir; I was invited there by —— and Jones on business.
Q. Now, Captain Thorwegan, you swore in your direct examina-

tion that you didn't have any money when you went into bankruptcy?

A. No, sir.

Q. Now, I desire to ask you if, at the time you went into bankruptcy and your assignee was elected, if you didn't take him down and offer to give him a present of a new suit of clothes at Champlin's; to go in and get a suit of clothes on your credit?

A. It might have been after I was discharged from bankruptcy.

Q. Not before?

A. No, sir.

Q. You swear you didn't do that before?

A. Before he was first appointed? Yes; I swear to that, that I didn't.

Q. No; I mean after your assignee was appointed.

177 A. Yes; I swear to that; after he was appointed I didn't offer him a suit of clothes.

Q. You were present at the interview with Capt. King when the statements were rendered?

A. Yes, sir.

Q. You gave the statements?

A. Miltenberger gave them to him.

Q. Tell the jury what those statements are.

Objected to.

WITNESS: They were given to him in 1877, I think; some time at the hotel.

Q. How came they to be given to him?

A. Miltenberger made out a statement.

The COURT. At whose request?

A. I think at King's. He wanted to see how he stood, and I told Miltenberger to make out a full statement of the boat's business.

Mr. KINNEY: Miltenberger says it was at Thorwegan's request.

Mr. CAMPBELL: He says nothing of the kind.

WITNESS. I had nothing to do with the books, and know nothing about them.

Q. State what transpired at that meeting; tell the jury.

A. Nothing transpired.

Q. Wasn't there anything transpired in regard to the gain

178 of that boat of $42,000?

A. Yes.

Q. What?

A. There was no $42,000 coming to King at that time.

Q. Your book-keeper swears they took it from the books?

A. As far as the books are concerned, I know as little as anybody can.

Q. I wish to ask this question, if your boat earned $200,000, and the expenses were $160,000, and the gain was $42,000, what became of the $42,000?

A. Paid out for the boat's liability—repair account—I suppose.

Q. Now, how much was the repair account?

A. I think Miltenberger told me about $20,000.

Q. Now that is $20,000—leaves $22,000 still. Well, what became of the $22,000?

A. I don't know.

Q. You don't know of anybody else that does?

A. Well, the books are here, and you can get experts and they will show you. You have had them for months, and if there is any money gone there, I haven't got it—not taken by me. I had
179 nothing to do with it in any shape or form. The books are there, and the experts can take them, and you have had them; I think you need not discuss the matter with me.

Deposition of John B. Keyser.

Counsel for defendant called John B. Keyser, who, being duly sworn, testified: That he was superintendent of the Memphis and St. Louis Packet Co.; had been engaged in the transportation business on the lower river about twelve years; he believed the reasonable value of the Grand Republic, at the time she burned, was $150,000.

Deposition of Silas Adkins.

Defendant next called, as a witness, Silas Adkins, who, being duly sworn, testified: That he was a steamboat builder, and had been in the business 35 years; he valued the Grand Republic, at the time she was burned, at $180,000.

Pl'ff's counsel objected to the testimony of Keyser and Adkins, as to the valuation of the boat, which being overruled by the court, counsel duly excepted at the time.

At the close of the case defendant's counsel offered the fol-
180 lowing instructions, 1, 2, and 4, which the court refused to give.

To which refusal of the court defendant's counsel then and there excepted.

Defendant's Instructions.

No. 1. The court instructs the jury that, under the issue in this case, the burden of proof rests upon the plaintiff, and unless the evidence clearly establishes that the plaintiff has been defrauded by the defendant in the manner stated in his petition, the jury must find for the defendant.

No. 2. The jury are instructed that unless the evidence clearly shows, that defendant, *with intent to defraud the plaintiff*, *falsely represented to have some material facts alleged in the petition*, and *relied on by plaintiff*, whereby plaintiff, to his *damage*, was induced to enter into the contract described in the petition, then they must find for

defendant. (See Joeffe *vs.* Collins, 21 Mo., 338, 342; 3 Term Rep's, 51; Chitty on Contracts, 439.)

No. 4. The court instructs the jury that unless they find
181 that the money described in plaintiff's petition was obtained by the defendant by means of fraud, and that the consideration which he gave for same was worthless when given, then the defendant is not liable.

Counsel for pl'ff then asked the court to give the following instructions to the jury, which being refused, pl'ff's counsel then and there excepted duly.

Plaintiff's Instructions.

If the jury believe, from the evidence, that confidential relations existed between the plaintiff and defendant on the first day of October, 1876, when the sale of an interest in the boat was made, and that plaintiff reposed full confidence in the statements and representations of the defendant at that time, and defendant failed to inform plaintiff fully in regard to the condition of said boat, and concealed the fact of the indebtedness of $68,000 or $70,000 against the steamboat at that time, your verdict will be for the plaintiff.

The court instructs the jury that the allegation of only part of the truth, with a view to deceiving the other party and in-
182 ducing him to act differently than he otherwise would do, is a fraud, for which the contract may be repudiated on an action for damages maintained.

To tell half the truth only is to conceal the other half, and concealment of this kind is simply falsement. If confidential relations existed between the pl'ff and def't at the time of the transaction, the def't was bound to disclose all the facts, and to conceal them was a fraud, which entitles the plaintiff to recover in a suit for the fraud and concealment.

The court then gave the following charge to the jury:

Charge to the Jury.

KING *vs.* THORWEGAN.

KREKLE, J. Gentlemen of the Jury: You, as jurors, are specially privileged, and it is your duty to pass upon the evidence in this case; but you are to pass upon it with reference to the law as given to you by the court.

183 Now the charge here is, that the plaintiff was defrauded by the defendant. The law never presumes fraud, but it abhors it, and, hence, will not allow you to presume fraud; but the fraud must be shown and proven, as one of the gentlemen has termed it, conclusively. I would say to your satisfaction, that is, when you view all the evidence in the case, you shall come to the satisfactory conclusion that this individual has been deceived, and acted upon the deception, and that this plaintiff obtained from him $12,000, which, it is charged, he did under color of false statements.

Now, gentlemen, it is very easy, in my mind, to separate the evidence—what is properly applicable, and what is not properly applicable. The complaint is that, by fraudulent and false statements, a suppression of the truth on the part of the defendant, the deception was practiced upon the plaintiff. Now, gentlemen, any after act after the transaction was accomplished, after the first day of October, after the arrangement was made, anything that parties did afterwards, as a matter of course, can have no influence upon the question.

184 The question for you to determine is, whether the defendant was deceived, and upon that deception paid his $12,000; and if there is anything that has been adduced to you in the after difficulties of the case, which goes to prove the facts that happened before, or to explain the facts that happened before, as a matter of course, you can take those after acts of the parties, the after transactions of the parties, and see whether there is anything in them that goes to explain how the transaction came to be entered upon and into at the time the money was paid over.

Now, gentlemen, that is the whole of the law in the case. The law will not permit any one to make fraudulent representation, and thus obtain from the party some valuable thing, money or otherwise. If any one commits a fraud of that kind, and thereby *loses his money*, having trusted to what was said to him, why the individual who does it is still responsible to the party thus defrauded. And in this connection, gentlemen, you will view the whole case, not only what the party said, but if you shall come to the conclusion he

185 left things unsaid that he ought to have said, that is, that there was a suppression of truth when it was demanded from him, or from other circumstances of the case, he ought to have disclosed the facts, that is just as bad as asserting a fact which does not exist, and, in relation to that, you will have to view it with the acts of the other party also.

Men, usually, who advance money are prudent to make inquiry, and you will view that state of the case on the part of the plaintiff here. He is an individual who has money; who advanced, under the evidence of the case, $5,000, and afterwards advanced $7,000 more. Now, gentlemen, you will have to determine, first, did this party make assertions which he knew to be untrue; did he suppress facts which, from the very circumstances of the case and his treatment of the plaintiff in the case, he ought to have disclosed? And on the other hand you will see here is an individual that has money, and has earned money; has been, so far as we know, familiar with the affairs of this life, and you will ask

186 how came it that he advanced the money in the manner he did, and did he make the inquiry that a prudent man ordinarily would make?

All these questions, gentlemen, you will look into in the consideration of the case, and ask yourselves; but the law of the case is simply what I have shown, and the law will not permit any one to

defraud another on false statements in the manner I have suggested.

Now, gentlemen, I am going to speak to you in reference to this case, as well as every other in which it is desirable a verdict shall be obtained; as you will be on juries hereafter, I want to indicate to you how you can easily arrive at a verdict in almost any case. When you retire to the jury room, you shall take a vote on the question "Do we find the issues for the plaintiff or the defendant?" You will determine that question first. The allegation here is set forth in the petition. The defendant denies it. Now you have heard the arguments and the instructions of the court, and when you enter the jury room one of you will take a hat, and each one, without saying what he is going to do, will write upon a piece of paper, saying: "I find for the defendant," or "I find for the plaintiff," and you will put in your ballots into the hat without telling any other member of the jury how you vote. Now, if you find you agree, that settles the question; if you find you find you do not agree, then you will sit down deliberately, as I am doing now, for the purpose of arriving at a conclusion and conversing over the matter, to see whether you can arrive at any conclusion, and after you have discussed the case, you will take another vote—and this is my reason for saying this to you—When you say "I am for the defendant," or "I am for the plaintiff," and assign a reason for it, you become a party to what you have said, and we dislike to change; but as long as no one of your fellow associates know what your opinion is, you are open to conviction, and are in a fair condition to sit down and consider the matter fairly, and arrive at a conclusion.

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In this case there may be no necessity especially, but in cases that present great difficulties, and I think this case is not free altogether from difficulties in that way, by sitting down and deliberating for the purpose of arriving at a conclusion, I think you will have no difficulty in arriving at a conclusion. You will pay attention to the verdict, the form of which will be: "We, the jury, find for the plaintiff, and assess the damages at so much;" or, if you find for the defendant, "We, the jury, find for the defendant." If you shall find for the defendant, that is the form of the verdict.

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Mr. CAMPBELL: I would ask the court if you have given one of the instructions I have offered?

The COURT: That embraces the whole of the instructions.

Mr. CAMPBELL: There is one point in one of my instructions I think the court overlooked, that the jury must find the defendant made this statement with intent to defraud.

The COURT: That is implied all the time. I have spoken of that matter all the time. You cannot misunderstand that question; it don't lie in cases of this kind, unless there is some intent in it.

To which charge as a whole the defendant then and there excepted, because the same did not fully instruct the jury as

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to the law bearing upon the case and was insufficient, and because the same was calculated to mislead the jury, and because said charge did not declare the law of the case, and because said charge was contradictory in this:

"Now, gentlemen, any after act, after the transaction was accomplished, after the first day of October, after the arrangement was made, anything that parties did afterwards, as a matter of course, can have no influence upon the question."

And afterwards, in the same charge, the court goes on to say:

"If there is anything that has been adduced to you, any after difficulties of the case which go to prove the facts that happened before, or to explain the facts that happened before, as a matter of course, you can take those after acts of the parties, the after transactions of the parties, and see whether there is anything in
190 them that goes to explain how the transactions came to be entered upon and into at the time that the money was paid over."

To which portions of the instructions of the court defendant's counsel then and there excepted.

And afterwards, and after the jury had retired, upon a request from the jury of further instructions, the court instructed the jury as follows:

Supplemental Charge to Jury.

In the Circuit Court of the United States for the Eastern District of Missouri. September Term, 1879.

KING, Plaintiff, } Law.
vs.
THORWEGAN, Defendant.

Supplemental charge to jury by Krekel, J.:

GENTLEMEN: I have sent for you because the law does not authorize me to instruct you privately. It requires all business to be done publicly, and hence I desire to answer your interrogatories in open court. The question is here asked: "The jury desire to be instructed whether the withholding of the true financial condition of the boat constitutes a fraud?"
191 Now, gentlemen, that depends upon facts. If the disclosing of it, as I have told you before, became a duty—that is, if the withholding was intentional for the purpose of accomplishing a fraud upon the individual—and it was necessary for it to disclosed, then such withholding would be a fraud. But if the individual advanced the money without any question, or any question concerning the financial condition of the boat, or if he took other guaranties, so as to secure himself against contingencies, then it might not be necessary. I can't answer the question by saying yea or nay, for

the very question depends on the circumstances of the case. For instance, I am talking to an individual designing to accomplish an object. If I find that individual is desirous of obtaining certain information for the purpose of either denying or granting the request I make, and I withhold the information, that is a fraud, provided I do it with the intention of inducing him to do a thing that he would not otherwise do. That is a fraud or deceit, as the law calls
192 it. You must view the case in connection with the whole transaction. If you should come to the conclusion that it became necessary for this individual to know the financial condition of the boat, and it was withheld by the other party intentionally, for the purpose of misleading him, then you should solve this question as you think the testimony justifies. So, you see, that for me to determine that question would be to determine the whole case, which you must determine from all the surrounding circumstances in which the parties are placed. First, look at the party advancing the money, as to the information he has, or whether he intended to have it; on the other side, at the acts of the party who wants the money. Did he make the statements designedly to mislead the individual, and induce him to do what he otherwise would not have done? And then at the matter which he took to secure him against liability of the boat, and in that connection the value of the boat becomes a material thing; and on a consideration of these matters you will come to a conclusion one way or the other. That is
193 all I can say. I can't give you any advice or opinion except as to the law.

Verdict of Jury.

Whereupon the jury retired and returned a verdict in the court in favor of the plaintiff for $12,000. Whereupon a motion for a new trial was made in due time by the defendant, in words and figures, as follows:

Motion for New Trial.

U. S. Court, Eastern District of Mo.

RICHARD KING *vs.* WM. H. THORWEGAN.

Now comes defendant and moves the court to set aside the verdict in this case, and grant a new trial, for the following reasons:

1. Because the verdict of the jury is contrary to the instructions of the court.
2. Because the verdict is contrary to the evidence.
3. Because the verdict is contrary to the weight of the evidence.
4. Because the verdict is contrary to the law.
5. Because the court erred in admitting evidence for the plaintiff contrary to the objections of defendant, and refused to admit
194 legal evidence offered by defendant.
6. Because the verdict is excessive, and shows prejudice on the part of the jury.

7. The court instructed the jury.

GIVEN CAMPBELL,
Att'y for Def't.

And thereupon, on the 21st day of January, 1880, said court announced that unless a remittitur of $5,000 was made by the plaintiff, the motion for a new trial would be sustained.

And thereupon, on the 22d day of January, 1880, the defendant entered a remittitur upon said verdict of $5,000, and the motion for a new trial was overruled, and judgment accordingly entered against the defendant.

To all of which rulings of the court defendant's counsel then and there excepted, and tenders this, his bill of exceptions, and asks that the same may be signed and sealed and made a part of the record in this case, which is accordingly done.

A. KREKEL, [SEAL.]
Presiding Judge.

196 Know all men by these presents, that we, William H. Thorwegan, as principal, and C. C. Maffitt, as surety, are held and firmly bound unto Richard King in the full and just sum of five hundred dollars, to be paid to the said Richard King, his heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this fourth day of January, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas, lately at the September term, A. D. 1879, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court, between Richard King, plaintiff, and William H. Thorwegan, defendant, judgment was rendered against the said defendant, Thorwegan, and the said defendant, Thorwegan, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard King, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next—

Now the condition of the above obligation is such, that if the said William H. Thorwegan shall prosecute said suit to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

WM. H. THORWEGAN. [SEAL.]
C. C. MAFFITT. [SEAL.]

Approved by—
SAMUEL TREAT, *Judge.*

Endorsed: No. 1276. United States circuit court, eastern district of Missouri. Richard King *vs.* Wm. H. Thorwegan. Bond. $500.

Wm. H. Thorwegan, principal; C. C. Maffitt, surety. Filed 4th day of Jan'y, 1881. M. M. Price, clerk.

197 UNITED STATES OF AMEBICA, } ss:
Eastern District of Missouri, }

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the pleadings and proceedings, in case No. 1276, of Richard King, plaintiff, against William H. Thorwegan, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this first day of September, in the year of our Lord eighteen hundred and eighty-one.

[SEAL.] M. M. PRICE, *Clerk of said Court.*
By A. P. SELBY, *Deputy.*

Endorsed on cover: E. Missouri C. C. U. S. No. 323. William H. Thorwegan, plaintiff in error, *vs.* Richard King. Filed October 3, 1881.

11-549

SUPREME COURT U.S.
FILED
MAR 17 1884
JAMES H. MCKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1883.

WILLIAM H. THORWEGAN,
Plaintiff in Error,
vs.
RICHARD KING,
Defendant in Error.
No. 323.

PLEADINGS, POINTS AND AUTHORITIES OF PLAINTIFF IN ERROR.

GIVEN CAMPBELL,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1883.

WILLIAM H. THORWEGAN,
Plaintiff in Error,
vs.
RICHARD KING,
Defendant in Error.
No. 323.

THE PLEADINGS STATED.

Plaintiff brought his suit against the defendant, Thorwegan, claiming that he was indebted to him in the sum of $12,000, with six per cent. interest from October 1, 1876, and as his cause of action alleged, that on or about the 1st day of October, 1876, defendant represented to plaintiff that he was the sole owner of the steamboat "Grand Republic," and with a design to injure and defraud plaintiff, knowing said boat at the time to be heavily encumbered with liens, claims and debts in the sum of about seventy-five thousand dollars, falsely and fraudulently represented to plaintiff that said boat was substantially free from all claims, debts and liability, and that if it were subject to any such that the defendant would forthwith pay them, preliminary to merging the title in a corporation, to be organized by defendant, and

that he would issue stock therein, representing the full value of said boat, free from all debts then existing against her; and that if plaintiff would advance to him $12,000, that plaintiff should become interested in said boat and that defendant would forthwith organize said corporation and convey to it the said steamer free of debt, and would issue to plaintiff 125 shares of stock therein, which would represent one-eighth of the entire stock.

That plaintiff relied upon said representations and believed them to be true, and did on or about October 1st, 1876, at defendant's special instance and request, advance to him the sum of $12,000, in consideration that plaintiff should become interested in said boat, and that defendant would issue to him one-eighth of the stock in said corporation, representing one-eighth of the full unencumbered value of said boat; that defendant on or about October 6, 1876, caused said corporation to be organized with a capital stock of $100,000, and conveyed said steamboat to it subject to encumbrances amounting to about $75,000, and issued 125 shares of said stock of the face value of $100 per share to plaintiff.

That said stock, by reason of said encumbrances on said boat, was without value, and is so at the institution of suit, and he asked judgment for $12,000, with interest from October 1, 1876. (Record, p. 12.

A general demurrer to this petition was overruled. (Record, p. 15.)

The answer of the defendant denied all the allegations of the petition, and specially denied each and every allegation in the petition charging fraud and deceit, and set forth his discharge in bankruptcy as a bar to the pretended demand of the plaintiff. (Record, p. 15.)

The replication denied that the discharge was a bar to the action, because the action accrued to plaintiff by reason of defendant's fraud as alleged in his petition. (Record, p. 17)

The cause was tried before a jury, and a verdict was rendered for plaintiff in the sum of $12,000. A motion for a new trial was made, and the Court, upon the plaintiff's remitting $5,000 of the verdict, overruled the motion and entered up judgment for the sum of $7,000, and defendant now brings the cause here by a writ of error.

ASSIGNMENT OF ERRORS.

I.

The Court erred in allowing the plaintiff, against the objection of defendant, to offer the following testimony, viz: of witness Geo. Miltenberger; that same was incompetent and irrelevant (Record, p. 72); which said portion of said depositions is in words and figures following, to-wit:

82 int. I desire to call your attention to Exhibit C, connected with the deposition of Richard King, in this case:
A. (Examines.) Yes, sir; that is my statement.
Q. Is it in your writing?
A. Yes, sir.
84 int. State, if you please, how you formed and made this statement.
A. That is a statement of receipts and expenses of trips —running expenses.
85 int. What else?
A. That is all.
86 int. Earnings?
A. No, sir; running expenses and the receipts.
87 int. State, if you please, how you made this statement?
A. I made that statement from the books.
88 int. Can you state about when you made it?
A. During the summer of 1877.
89 int. Are you positive of that fact?
A. Yes, sir.
90 int. That she made sixteen trips up to the summer of 1877?
A. Yes, sir.

91 int. Isn't that a statement of all the trips that that boat made up to the time she burned?

A. That is a supplementary statement.

92 int. The statement is correct, is it; you drew it off the books?

A. Yes, sir.

93 int. State what the earnings of that boat was from your statement, the sixteen trips made by her.

A. From which statement?

94 int. That before you.

A. That shows $42,619.27, but a good deal of that time we were in a pool here, and we paid out money all the time, but we counted the receipts same as if they had not paid out anything for the pool, because we were receiving benefits from the pool all the time, and did not know how the final outcome would be till the pool was all wound up.

95 int. Look at your statement, marked Exhibit I, attached to deposition of Richard King in this case.

A. (Examines.) Yes, sir.

96 int. Is that your handwriting?

A. Yes, sir.

97 int. State about what time you made that.

A. Same as the other.

98 int. About September, 1877?

A. Yes, sir.

99 int. After the sixteen trips had been made by the boat?

A. Yes, sir; it was after the sixteen trips were made.

100 int. State what that shows, if anything, to the credit of Captain King in the possession of the Grand Republic Transportation Company at that time.

A. It shows a credit of $2,161.77.

101 int. Is that statement correct, taken from the books of the books?

A. Yes, sir.

102 int. You referred to the pool account; I desire to call your attention to Exhibit "F."

A. Yes, sir.

103 int. State, if you please, how that account stood at the time the boat burned, in regard to profit and loss.

A. It stood at a loss of $8,011.70, none of which was included in the statement—I mean the other exhibit—I don't mean this exhibit.

104 int. Do you find that charge to be, in your statement to Mr. King, a charge against him when he had a balance to his credit of $2,161.70 on the books of the boat?

A. I don't undertand it that way at all—Mr. King owned in the boat. The loss on the pool was $2,366.36. That is all that is charged against him, him and Thorwegan together.

105 int. That is charged to him in this statement and deducted from his profits on the boat, leaving him a balance of $2,161.77.

A. His one-eighth of it, yes.

106 int. Then that was taken into account in his statement rendered to Mr. King?

A. Yes, sir.

By Mr. CAMPBELL: Which statement?

A. The statement Exhibit D.

By Mr. KINNEY: You say this statement was drawn from the book?

A. Yes, sir.

107 int. I desire to call your attention to Exhibit C, attached to the deposition of Mr. King.

A. Yes, sir.

108 int. That is your writing and name, is it not?

A. Yes, sir.

109 int. The facts stated in there are true, are they not?

A. Yes, sir.

Counsel for the defendant objected to the introduction of exhibit, as incompetent.

110 int. I desire to call your attention to the statement of the pool again. In pooling the profits, were the net profits of each trip paid over, or merely a statement rendered?

A. Merely a statement rendered.

112 int. Did the books show a direct credit to Capt. King of that $2,161?

A. Yes, sir.

113 int. And a dividend credited to each particular stockholder of the Grand Republic Transportation Company?

A. That I can't say.

114 int. How did you happen to make this dividend to Capt. King, if you were not a book-keeper for the transportation company?

A. Mr. King wanting his accounts to stand on the boat's books just the way that it was at that time; he didn't care about the money.

115 int. You still make a distinction between the boat's books and the books of the corporation, do you?

A. Yes, sir.

116 int. I desire to call your attention to Exhibit G, attached to Capt. King's deposition.

A. Yes, sir.

117 int. Do you recognize that book?

A. Yes, sir.

118 int. State what it is.

A. It is the transportation company's book—minute book of the meeting of business.

119 int. State, if you please, if you were present at the meeting held in St. Louis by the Grand Republic Transportation Company, October 17th, 1877.

A. Yes, sir.

120 int. State if at that time, or about that time, you became trustee for the Grand Republic Transportation Company.

A. Yes, sir.

121 int. State what you did as such trustee?

Objected to, as the subject matter is irrelevant and incompetent.

A. I collected what money I could and paid it out to the different creditors of the Transportation Company.

122 int. State whether or not the books show a correct statement of the indebtedness of the boat at the time she burned?

A. It is very near correct; there ain't much difference.

123 int. Is it more or less?

A. Very little more; it is correct in the main amounts, $78,000 and something.

II.

The court erred in refusing to instruct the jury, at the close of plaintiff's testimony, that under the pleadings and evidence he was not entitled to recover. (R., p. 77.)

III.

The court erred in refusing to give the following instruction asked by defendant, viz:

No. 1. The court instructs the jury that, under the issue in this case, the burden of proof rests upon the plaintiff, and unless the evidence clearly establishes that the plaintiff has been defrauded by the defendant in the matter stated in his petition, the jury must find for the defendant.

IV.

The court erred in refusing to give the following instruction offered by defendant, viz:

No. 2. The jury are instructed that unless the evidence clearly shows, that defendant, with intent to defraud the plaintiff, falsely represented to him some material fact alleged in the petition, and relied on by plaintiff, whereby plaintiff, to his damage, was induced to enter into the contract described in the petition, then they must find for de-defendant.

V.

The court erred in its charge to the jury in the following particular parts, viz:

(*a.*) "I would say to your satisfaction, that is when you view all the evidence in the case, you shall come to the satisfactory conclusion that this individual has been deceived, and acted upon the deception, and that this plaintiff obtained from him $12,000, which it is charged he did under color of false statements.

(*b.*) "Now, gentlemen, it is very easy, in my mind, to separate the evidence — what is properly applicable, and what is not properly applicable. The complaint is that, by fraudulent and false statements, a suppression of the truth on the part of the defendant, the deception was practiced upon the plaintiff. Now, gentlemen, any after act after the transaction was accomplished, after the first day of October, after the arrangement was made, anything that parties did afterwards, as a matter of course, can have no influence upon the question.

(*c.*) "The question for you to determine is, whether the defendant was deceived, and upon that deception paid his $12,000; and if there is anything that has been adduced to you in the after difficulties of the case, which goes to prove the facts that happened before, or to explain the facts that happened before, as a matter of course, you can take those after acts of the parties, the after transactions of the parties, and see whether there is anything in them that goes to explain how the transaction came to be entered upon and into at the time the money was paid over.

(*d.*) "Now, gentlemen, that is the whole of the law in the case. The law will not permit any one to make fraudulent representation, and thus obtain from the party some valuable thing, money or otherwise. If any one commits a fraud of that kind, and thereby *loses his money*, having trusted to what was said to him, why the individual who does it is still responsible to the party thus defrauded. And in this connection, gentlemen, you will view the whole case, not only what the party said, but if you shall come to the conclusion he left things unsaid that he ought to have said, that is, that there was a suppression of truth when it was demanded from him, or from other circumstances of the case, he ought to have disclosed the facts, that is just as bad as asserting a fact which does not exist, and, in relation to that, you will have to view it with the acts of the other party also.

(*e.*) "Men, usually, who advance money are prudent to make inquiry, and you will view that state of the case on the part of the plaintiff here. He is an individual who has money: who advanced, under the evidence of the case,

$5,000, and afterwards advanced $7,000 more. Now, gentlemen, you will have to determine, first, did this party make assertions which he knew to be untrue; did he suppress facts which, from the very circumstances of the case and his treatment of the plaintiff in the case, he ought to have disclosed?"

(*f.*) The court erred in its supplemental charge to the jury.

POINTS AND AUTHORITIES.

First. The court erred in admitting the testimony specified in the first assignment of error.

The money was advanced October 1st, 1876, and all this testimony was in relation to the affairs of the steamboat after the date mentioned, and was explanatory of business statements made by the clerk showing the earnings and expenditures of the steamboat in the year 1877, which had no bearing at all upon the point at issue, and was calculated to mislead and confuse the triers of the facts.

Lucas v. Brooks, 18 Wallace, 436.

Second. The instruction in the nature of a demurrer to the evidence, mentioned in the 2d assignment of error should have been given.

Under the pleadings, and evidence adduced by plaintiff, the court should have instructed the jury that the plaintiff could not recover.

The petition did not state fact sufficient to constitute a cause of action. A case of fraud or deceit was really not alleged in plaintiff's petition. In an action at law for fraud or deceit, the petition should set forth the facts constituting the fraud. It should have alleged a representation or representations, express or implied, false within the knowledge of the defendant, reasonably relied on by the

plaintiff and constituting a material inducement to his contract or act, and that he suffered damage thereby; and the representations alleged must have been false representations of facts past or present.

The reading of the petition will show that the gist of plaintiff's complaint is that defendant did not comply with a promise that he then made, that he would organize a corporation to own the boat, and that he would transfer the boat to the corporation free from liens and encumbrances, and would then transfer to plaintiff one-eighth of the stock of the corporation in consideration of the $12,000 previously advanced to him, a mere promise to be performed *in futuro*. This was the pith of his petition, and a non-performance of such promise constituted no actionable fraud.

The bill of exception sets out all the evidence produced by plaintiff to support the issues on his part. An examination of this testimony will show that there was no competent evidence before the jury to sustain a recovery upon the ground of fraud.

Plaintiff claims he has been defrauded by defendant of $12,000. As to $5,000 (the first sum advanced), the plaintiff states himself out of court in the following language (Record, pp. 22–3):

"7 int. State when you first saw him in regard to money matters.

A. I went into Gregory's one day to take a drink, and Captain Thorwegan was sitting down, I think, on a chair at a table in the bar-room with a handful of papers in his hand; and he said he was ruined if he didn't get some money that day; that his insurance had run out: that he had no money to pay it: that he had bills to pay, and that if he didn't get it that day his notes would be protested, and I don't know what all he said; but he made a great ado in a talking and crying sort of way.

8 int. Did you let him have some money that day?

A. I told him then, says, 'I will draw a check on the Mechanics' Bank, and I will let you have $5,000,' and he said he would rather I would go with him and get it, or might draw it myself, and I told him I would go to the bank with him and get it. I went to the Mechanics' Bank with him and got it, and gave it to him—$5,000."

The plaintiff states under what circumstances he advanced the remaining $7,000. I quote from his testimony (Record, p. 23.)

10 int. State when you next saw him in regard to the purchase of an eighth interest in the steamboat Grand Republic and the capital stock in the Grand Republic Transportation Company.

A. He had taken me up to his boat after that time, several times; we went in a carriage, and we went in the hold and all over it, all about her, up-stairs and down-stairs, and all over her; we must have went three or four times, I reckon, and I was thinking of buying a little boat that was lying up there, clo[illegible] boat, a little iron boat, and then he talked [illegible] about buying an interest in his boat, and one thing a[illegible]ther, and talked along some days, and finally I agreed [illegible]e an eighth interest in the boat at $12,000.

11 in[illegible]hat was $7,000 besides the $5,000 you had let him ha[illegible]

A. [illegible], sir.

12 int. State what he said at that time, and when this was, the month and year, as near as you can.

A. I think it was in September; some time between the middle, maybe the 15th or 20th of September, I am not positive as to the date, but I think in September, 1876; I think the $7,000 was paid about the first of October.

13 int. State what, if anything, Captain Thorwegan said at this time in regard to the indebtedness existing against the boat.

A. He said if he could get that much money it would pay out the debt, and would leave her clear of all debts, and that if he didn't get the money the boat would be tied up before he left here and he wouldn't be able to turn a wheel.

14 int. Did he say anything about the amount of indebtedness existing against it at that time?

A. No, sir; not that I can remember.

15 int. This transpired in the City of St. Louis?

A. Yes, I think the first time I spoke to him was on a Sunday morning; I was boarding at the Southern.

Again, at page 26 of Record, he says:

"When he got the money from me, he got it, he said, to pay her debts."

Again, at pp. 29, 30, 31, 32, he relates the whole transaction.

At p. 33 of the Record, the plaintiff testified as follows:

119 int. Did he tell you then if he got this money he would pay the debts?

A. I don't know what he said on that subject; he said he wanted the money to pay, or I think he said that he wanted the money to pay the debts that he owed on the boat.

120 int. And he promised you that he would pay these debts, did he, out of this money?

A. I didn't ask him that question."

Again, on his cross-examination, he testified as follows (Record, p. 37):

169 int. As I understand, you testify in your examination-in-chief that Thorwegan promised that he would pay off the debts due by the boat and all the demands against her?

A. Yes, sir.

170 int. And you relied on that promise?

A. I did.

171 int. And on that you let him have your money?

A. Yes, sir.

172 int. That's the way of it?

A. Yes, sir.

173 int. You didn't care about an interest in this boat particularly, but you wanted to help Thorwegan more than anything else, that was your motive?

A. That was the motive; I saw he was in trouble, as he stated to me.

The foregoing is from the only witness examined by the plaintiff, who knew anything of the transactions as they

took place, and this testimony not only fails to sustain the pretensions of a legal fraud, but directly negatives them.

Again, the plaintiff's own testimony shows that he did not rely upon the representations of defendant. He states that he was an old steamboatman; that he went all over the boat and examined her thoroughly; that she was a very valuable boat; that she was being repaired (painted); that he suggested that she should be put into a corporation, as he did not wish to become an owner in an encumbered boat; that he employed his attorney, Mr. Day, to superintend the matter of her incorporation, and through his attorney, Mr. Day, he exacted from defendant a written obligation to hold his interest free and harmless from the existing debts against the boat, and he only aroused himself to the position of one defrauded and deceived after the boat perished by fire, insufficiently insured to indemnify him for the loss of his 120 shares of stock.

Under these circumstances he could not complain.

Benjamin on Sales (4th Am. ed. by Bennett), §§ 452, 453.
Campbell v. Fleming, 1 Ad. & E. 40.
Redgrave v. Hurd, 20 Ch. Div. 1 c. a.

The law is well stated in

Pasly v. Freeman, 2 Smith's Lead. Cases, p. 157.
Conard v. Nicoll, 4 Peters, 295.
Clarke v. White, 12 Peters, 196.
Hagar v. Thompson, 1 Black, 80.

The pleadings and evidence considered as aforesaid, there was error committed by the court in refusing to give the instruction that plaintiff could not recover.

Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700.

Third. The defendant was entitled to have the law laid down as specified in the 3d assignment of error.

The jury should have been instructed that it was necessary; before they could find for plaintiff, that they must find from the evidence that plaintiff was defrauded in the manner stated in the petition.

The charges of false representation of facts, material facts, alleged in the petition, were all that the defendant was legally required to answer. At law, fraud must be proved as alleged.

Conard v. Nicoll, 4 Peters, 295.
U. S. v. Arredondo, 6 Peters, 716.

In equity fraud may be inferred, not so at law.

Spence Eq. Jurisdiction, vol. 1, p. 625.

Fourth. The court should have given the 2d instruction offered by defendant, as it embodied the law applicable to the case. The charge of the court did not meet these points. The charge of the court did not limit the jury to the consideration of evidence relevant and pertinent to allegations of false representations of material facts set out in the petition.

The charge did not properly instruct the jury as to their consideration of the question, whether the plaintiff had been damaged by these representations alleged in the pleadings of plaintiff, yet there was ample evidence in the record upon this issue.

Miltenberger said the boat when burned was worth $175,000; Thorwegan, $168,000; Adkins, $180,000; Keiser, $150,000.

There was ample evidence before the jury, had the court given this instruction, upon which they could have found, that just before the boat was burned, plaintiff's 120 shares

of stock were worth more than $12,000, almost double the $7,000 which he last advanced to plaintiff.

Upon these points the defendant was entitled to a direct and positive declaration of the law to the jury, yet the charge of the court does not met these requirements.

Hall v. Weare, 92 U. S. 728.
Joliffe v. Collins, 21 Mo. 338–342.
Bailey v. Smock, 61 Mo. 218.

Fifth. The court's charge tended to mislead the jury.

The first specification (*a*) left it to the jury to find from all the evidence before them that plaintiff was deceived, and that defendant, under color of false statements, which it is charged he made, obtained $12,000 from him.

Now, there was literally no evidence that the defendant obtained the first five thousand dollars upon any false statement.

Again, this charge is too broad, for it left it to the jury to find for plaintiff if any promise as to things to be performed in the future, was not truly kept.

That portion of the charge set forth in specification (*b*) was equally incorrect.

The court says "the complaint is that by fraudulent and false statements, a *suppression of the truth* on the part of defendant, the deception was practiced upon plaintiff," etc.

Here we have the court instructing the jury that the complaint alleges a *suppression of the truth* on the part of the defendant, and that if they find from the evidence this charge is true, they shall find for plaintiff. The petition does not allege any concealment or suppression of the truth, and none could be legally proven under the pleadings. The court framed here an issue not made by the pleadings.

Nor was there any evidence of a suppression of the truth. King repeatedly stated that he made no inquiries as to the indebtedness of the boat; that he loaned the money as an act of kindness. (Record. pp. 34, 37.)

The law is elementary, that the court in its charge should ignore every hypothesis which is not founded upon the evidence.

New Jersey Mut. Ins. Co. v. Baker, 94 U. S. 611.
Camp v. Heelan, 43 Mo. 591.
Gilchrist v. Downell, 53 Mo. 591.
Iron Mountain Bk. v. Armstrong, 62 Mo. 73.
Chabbuck v. Hannibal & St. Jo. R. R. Co. 77 Mo. 591.
Thompson on Charging the Jury, § 62 and notes.
Utley v. Tolfnie, 77 Mo. 307.

That portion of the court's charge, specification (*c*) was inconsistent and contradictory with the part specified (*b*); in this latter specification the jury were told not to consider any act after October 1, 1876, and in the next paragraph (*c*) the court tells them they may consider any of the after difficulties of the case, and from them and the after transactions of the parties, see whether there is anything in them that goes to explain how the transaction came to be entered upon and into at the time the money was paid.

This was error, and no doubt misled the jury.

The portion of the charge, specification (*d*), was unintelligible, and was objectionable upon the same grounds as heretofore alleged against the charge, in that it submitted to the jury a hypothetical state of facts, not founded upon the pleadings or evidence. There was no allegation in the pleadings, nor any evidence of "*a suppression of truth when it was demanded of him* (*defendant*).

The portion of the charge, specification (*e*), is objectionable and misleading for the same reasons. The action of the

jury clearly disclosed that they were befogged, when they came in and asked for further instructions, "whether the withholding of the true financial condition of the boat constitutes a fraud."

And the court, by its supplemental charge, led them further in the wrong direction, and their verdict was the answer to his direction. The only evidence that they could have meant was the confusing and irrelevant testimony of the after transactions between the parties, embraced in the statements contained in the Record from pages 41 to 48, with which they should have been instructed they had no concern.

The court should not have instructed the jury upon issues not made by the pleadings.

Moffat v. Conklin, 35 Mo. 453.
Lembert v. Palmer, 29 Iowa, 104.
Dwyer v. Dunbar, 5 Wallace, 318.

The instructions did not cover the whole case.
Hall v. Weare, 92 U. S. 728.

Upon consideration of the foregoing, it is respectfully submitted that the judgment should be reversed.

GIVEN CAMPBELL,
Attorney for Plaintiff in Error.

11-549

FILED
APR 16 1884
JAMES H. MCKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1883.

WILLIAM H. THORWEGAN,
Plaintiff in Error,
vs.
RICHARD KING,
Defendant in Error.
No. 323.

[Error to the Circuit Court of the United States for the Eastern District of Missouri].

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

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the sum of $75,000, falsely and fraudulently represented to defendant in error, that said boat was substantially free from all liens, claims and liability, and that if it was subject to any debts, liens, liabilities or claims, they were but small in amount; and that the plaintiff in error, would forthwith pay them off and cause the same to be discharged as a preliminary to merging the title and ownership of said boat in a corporation, to be organized by plaintiff in error, and to issue stock therein, representing the full value of said boat, free and clear of all incumbrances, debts, liens and liabilities then existing against said boat. That in pursuance of his said fraudulent design, plaintiff in error represented to defendant in error, that if he would advance to plaintiff in error at that time the sum of $12,000, he, defendant in error, should become interested in said boat; and that he, plaintiff in error, would forthwith organize a corporation as aforesaid, and convey to it the title to said boat free of all incumbrances and liability, and issue to defendant in error 125 shares of stock therein (the par value of a share being $100), which would represent one-eighth of the title and ownership of said boat; and be one-eighth of the entire amount of the capital stock of such corporation.

That defendant in error fully relied upon said representations, and believed them to be true; and, so believing and relying on the truth of said representations, on or about said 1st day of October, 1876, at the special instance and request of the plaintiff in error, he, defendant in error did advance to him, plaintiff in error, the sum of $12,000 in cash in consideration that the defendant in error should become interested in said boat, and that plaintiff in error would cause to be issued to defendant in error said shares of stock in said corporation.

That on or about the 6th day of October, 1876, plaintiff in error caused said corporation to be organized under the name of the Grand Republic Transportation Company, with a capital stock $100,000, divided into shares of $100 each; and he conveyed said boat to said corporation, and he caused

125 shares in the capital stock of said corporation to be issued to the defendant in error.

That at the time when plaintiff in error conveyed said boat to said corporation, said boat was incumbered with debts, claims, liens and liabilities nearly to its cash value, to-wit: to the sum of about $75,000, and it remained so incumbered from that time forward, and that in consequence thereof the 125 shares in the capital stock of said company, issued to defendant in error as aforesaid, were without value, and utterly worthless, and have so remained to the time of the institution of this suit.

That by reason of the residence of the defendant in error being in the State of Texas, he had no means of ascertaining the condition of said boat until July, 1878, and as soon as he did he immediately commenced this suit. Before commencing suit he tendered to plaintiff in error said 125 shares of stock, and demanded from the plaintiff in error the return of the $12,000, which the plaintiff refused to return.

Defendant in error then asked judgment against the plaintiff in error for said sum of $12,000, and the interest thereonsince the 1st day of October, 1876. (Record p. 12.)

The plaintiff in error denied all and singular the allegations in the petition, and he alleged that he had been adjudicated bankrupt on the 30th day of October, 1877, and he pleaded his discharge in bankruptcy on the 26th day of July, 1878, as a perpetual defence and bar against the claim of the defendant in error. (Record, page 16.)

The defendant in error replied to said answer, pleading the discharge of the plaintiff in error in bankruptcy, that the right of action and recovery of the plaintiff in error arose and accrued to the defendant in error by reason of the *fraud* of the plaintiff in error, as stated and set forth in the petition of the defendant in error, and denied that said discharge was any bar to the right of action of the defendant in error. (Record, p. 17.)

The case was tried before a jury on the 25th and 26th days of September, 1879.

On the trial the deposition of the defendant in error was read in evidence. He deposed that he lived in Nueces County, Texas; that he was in St. Louis, and met the plaintiff in error some time from the 15th to the 20th of September, 1876, and in a conversation the plaintiff in error said "he was ruined if he didn't get some money that day; that his insurance had run out; that he had no money to pay it; that he had bills to pay, and if he didn't get it that day his notes would be protested." That he then let the plaintiff in error have $5,000. (Record, pp. 22, 23.)

After that plaintiff in error took him up to his boat, the Grand Republic, then lying in port in St. Louis, and showed her to defendant in error, who was thinking of buying a little boat lying close by the Grand Republic. Plaintiff in error then proposed to defendant in error to sell him an interest in the Grand Republic. They talked along some days, and finally defendant in error agreed to take an eighth interest in her at $12,000. He paid $7,000 about the 1st of October following. At the time of agreeing on the amount to be paid for the one-eighth interest in the boat, the plaintiff in error stated that "if he could get that much money it would pay out the debt, and would leave her clear of all debts, and that if he didn't get the money the boat would be tied up before he left here, and he wouldn't be able to turn a wheel." (Record, p. 23.) And he said he would form a corporation with a capital stock of $100,000, and he would put her into it at that sum, and he would turn her over to the corporation "clear of all incumbrances in every particular" (pp. 23, 24), and he would issue to defendant in error one-eighth of the stock in the corporation, *i. e.*, 125 shares of $100 each, for the $12,000 paid by him to plaintiff in error."

"All debts due, and all demands on the boat, repairs, etc., up to the time when the boat left the wharf on her trip south, in October, 1876, were to be settled and paid by

Capt. Thorwegan (p. 25)." "When he got the money from me, he got it, he said, to pay her debts; I don't know what he done with it."

"42d Int. Did he say this money was to pay the debts existing against that boat at that time? A. He said he kept the $5,000 for that purpose, and the balance would put him out with her clear of all debts and everything to go down south.

"43d Int. State whether or not there was ever any cash value to this stock in this Grand Republic Transportation Company issued to you by Capt. Thorwegan? A. *None that I know of.*

"44th Int. Did you place full reliance and credit on the statements of Captain Thorwegan in regard to the condition of that steamboat? A. I did; I had perfect confidence in them." (p. 26).

"54th Int. Did you place full confidence and belief on the representations and statements of the defendant? A. I did sir; I had perfect confidence in him from the time I left here." (p. 27).

The defendant in error deposed that he did not know of any debt existing against the Grand Republic Transportation Company, or the Grand Republic, until the summer of 1878, after she had been burnt, when he was informed by the plaintiff in error, upon inquiry, that the debts were over $75,000. That he "would buy nothing with incumbrances on it." (pp. 30, 31).

The deposition of George Miltenberger, the clerk of the Grand Republic, was read in evidence by the defendant in error. It corroborated the testimony given by the defendant in error in many of the material facts. He deposed, in answer to the question—"Can you tell me what indebtedness was against that boat October 1, 1876?"—A—"Between sixty and seventy thousand dollars; sixty-eight thousand, I believe." (P. 57.) He deposed that the statements furnished to the defendant in error—the exhibits attached to the deposition of the defendant in error,

were made out by him. "Capt. Thorwegan told me what to do and what to make out." (P. 58.) That exhibit, C, "only includes running expenses;" "it is just a memorandum; don't show nothing at all; just memorandums;" p. 60. In other words, they will not show the true financial condition of the boat. He further deposed that the Grand Republic "owed about $10,000 liens, if you don't include the building account," when the Transportation Company was organized, i. e. about October 1st, 1876. That she owed altogether about $70,000, including the building account. A good many of the building accounts had been settled by the notes of the plaintiff in error. Of the $70,000 owing by or on account of the boat, there were about $10,000 liens, for which the boat could have been tied up. (P. 62, 63.)

The plaintiff in error objected to the admission of all that part of Miltenberger's deposition in evidence, commencing with the 82d question and running to the 123d question, on the ground that it is incompetent and irrelevant. The court overruled the objection, and the plaintiff in error excepted. (P.p. 72, 75.)

B. Kinney testified as attorney for defendant in error, to tendering the money, $6,125, to the plaintiff in error, which was in the Grand Republic Transportation Company, and demanding the $12,000 and interest. (p. 75.)

This was all the evidence offered by the defendant in error. Thorwegan, the plaintiff in error, demurred to the evidence of the defendant in error. The court overruled the demurrer, and the defendant duly excepted. (P. 75.)

The plaintiff in error read in evidence his certificate of discharge in bankruptcy, as alleged in his answer. (P. 76.)

He next read in evidence the contract between him and the defendant in error, dated October 1st, 1876, by which he sold one-eighth interest in the steamboat Grand Republic to the latter. Plaintiff in error then testified in his own behalf: that he owed from $16,000 to $18,000 of money in bills payable, and "there will be no trouble for me to pro-

tect the running-account, but that paper is out that is pressing me, and I have to pay it."

Q. How much did you say you had out? A. from $15,000 to $17,000 that was pressing me. The bills payable.

The boat was in my name at the time I sold him the one-eighth for $12,000, and I said to him the boat was in debt. He didn't want to know. I suppose *he had confidence in me*, that I would treat him just and right. (P. 79.)

Q. Did you ever make any representation to Mr. King as to the amount of the indebtedness of this boat at the time you got this loan of $17,000? A. He never asked for it. I was willing to show him at any time. I wanted him to come down and look at the boat's books and affairs and he didn't want to do it. (P. 82.)

John B. Keyser, superintendent of the St. Louis and Memphis Packet Company, put the boat at $150,000, and Silas Adkins, a steamboat builder, at $180,000. (P. 86.)

The plaintiff in error made three requests of the Court to charge the jury. But they were all substantially covered by the charge as given. (P. 86.)

The jury found a verdict for the defendant in error for $12,000. The plaintiff in error thereupon filed a motion for a new trial. The court required the defendant in error to remit $5,000, which was done, and judgment was rendered for $7,000, and the motion for a new trial was overruled. The case is brought to this court by writ of error.

BRIEF.

This case involves the construction to be given to the following words in the Act in regard to bankruptcy: "No debt created by the *fraud* of the bankrupt * * * shall be discharged by proceedings in bankruptcy." (§ 5117 Rev. Stats.)

This action is in form *ex delicto* to recover the sum of $12,000, alleged to have been paid by the defendant in error to the plaintiff in error, for the one-eighth interest in the steam-

boat Grand Republic in consequence of the false and fraudulent representations of the plaintiff in error to the defendant in error, whereby the latter was induced to purchase said interest. While the case grows out of a contract, it is based entirely on the *fraud* practiced by the plaintiff in error on the defendant in error when the contract was entered into. The true point of inquiry, then, is, whether the alleged false and fraudulent representations, if true, constitute such fraud as to come within the purview of said section of the bankrupt law and prevent the discharge in bankruptcy of the plaintiff in error from operating a perpetual defense and bar to this action.

I.

An action on the case for deceit lies for false and fraudulent representations, whereby a party is induced to enter into a *contract*; and is misled, deceived and injured.

Fraud renders all contracts *voidable ab initio*, both at law and in equity. No man is bound by a contract into which he has been deceived by fraud, because assent is necessary to a valid contract, and there is no real assent where fraud and deception have been used as instruments to control the will and influence the assent.

Fraud is said be "every kind of artifice employed by one person for the purpose of deceiving another." Still, courts and lawyers have alike wisely refrained from any attempt to define with exactness what constitutes fraud, it being so subtle in its nature, and so Protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade.

§ 663 Benjamin on Sales (Corbin's ed.)

Hence it is that courts submit the facts, with proper instructions, to juries to pass upon, and say whether in the given case they constitute fraud, or not.

Before plaintiff can recover in an action of this kind, he must allege and prove the following facts, viz:

First. That the facts represented to the plaintiff by the defendant were false.

Second. That the defendant, when making the representation, knew them to be false, or at least did not know them to be true.

Third. That the plaintiff relied on them.

Fourth. That they were material.

Fifth. That the plaintiff was deceived and misled to his injury.

Tested by these rules, the petition upon which this case was tried, conforms to them in every respect, and the evidence fully sustains the allegations in the petition.

Pasley v. Freeman, 3 Durnf., and E.
Williamson v Allison, 2 East, 446.
Gerhard v. Bates, 2 Ellis & Black, 475.
Carter v. Glass, 44 Mich., 154.
Medbury v. Watson, 6 Met., 246.
Fowler v Abrams, 3 E. D. Smith, 1.
2 Chitty's Pleadings, 526 (Ed.)

This action might be treated as a false warranty of the title to one-eighth interest in the steamboat, Grand Republic. In that case an action on the case for the deceit would lie, and it would not be necessary to allege or prove that the plaintiff in error knew the warranty to be false.

Williamson v. Allison, 2 East, 441.
Fowler v. Abrams, 3 E. D. Smith, 1.
Carter v. Glass, 44 Mich., 154.

Says Woodruff, J., in delivering the opinion in the case of Fowler v. Abrams, *supra*: "The form of complaint in this case is taken from 2 Chitty's Pleadings (4th Am. ed.), p. 316, and is to be found in 3 Wilson's Reports, pp. 40 to 43; and a note to Chitty refers to several ancient books of precedents, as the guide of the writer in introducing it into his volume, and the cases and authorities which I shall have occasion to notice do not leave it doubtful that (although

assumpsit is now the usual remedy for the breach of an express warranty), the *action on the case was formerly the common remedy*, and may still be used, if the pleader think proper. The reason given by Mr. Chitty why assumpsit is more generally used, is, that if that form of action be adopted, the count for money had and received to the plaintiff's use may be added, which is often convenient. 1 Chitty, 140."

The contract in this case is tainted with *fraud* in *its inception*, and the action is in form *ex delicto*.

This taint still inheres in this case and makes the claim a "debt created by *fraud*" within the true intent and meaning of the bankrupt act.

In re Charles G. Patterson, 1 Bank Reg., 307.
In re Devore, 2 *id.*, 27.
In re Robinson, 2 *id.*, 341.
Stokes v. Mason, 12 *id.*, 498.
Warner v. Cronkhite, 6 Bissell, 453.
Morse v. Hutchins, 102 Mass., 439.
Brown v. Beach, 52 Miss., 439.
Broadnax v. Bradford, 52 Ala., 290.

Says Judge Blatchford, in delivering his opinion *in re* Charles G. Patterson (1 Bank Reg., p. 309): "Wherever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by *fraud*, had its root and origin in fraud, true it is not to be discharged. To hold that the recovery of a judgment, in an action where the gravamen of the complaint is *fraud*, condones that very fraud, by so merging the original claim, that the judgment cannot be said to be a debt created by the fraud set out in the complaint as ground for recovering the judgment, would fritter away entirely the good sense and plain intention of the 33d section."

Says Mr. Justice Harlan in delivering the opinion of this court in the case of Neal v. Clark, 95 U. S., on p. 709: "The fraud referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional

wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality."

This construction of the word "fraud" in the bankrupt act was approved by Chief Justice Waite, in delivering the opinion, in the case of Wolf v. Stix, 99 U. S., on p. 7.

The allegations and evidence in support of them, and the charge of the court and the verdict of the jury in this case, all conclusively establish the proposition that there was "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong," perpetrated by the plaintiff in error on the defendant in error in the making of the contract in question.

II.

The objection to the testimony of George Miltenburger, from the 82d to the 123d interrogatory, on the ground of *irrelevancy*, is not properly saved and it is not well taken for several reasons:

First. The objection is to the whole of it in a lump, when a portion of it is relevant.

Second. If any part was improperly admitted, it was that part of the exhibits giving a detailed statement of the earnings and expenses of the steamboat in question after the 1st of October, 1876, the day of the sale of the one-eighth interest in the boat. The earnings and expenses prior to that date were certainly relevant, and they were all contained together in the same exhibits.

Third. The plaintiff in error was the master, and Miltenberger was the clerk of the boat, and he had sent them to the defendant in error by *direction* of the plaintiff in error. (See Record, p. 58.)

Fourth. Said exhibits had all been read in evidence in connection with the deposition of the defendant in error, without objection, and were before the jury; and Miltenberger's testimony was only explanatory of them, and showed that they did not exhibit the *true financial condition* of the steam-

boat, either before or after the day of the sale. Moreover, the issue was whether the plaintiff in error had practiced a *fraud* on the defendant in error in the sale of one-eighth interest in said boat. This necessitated an inquiry into all the dealings and transactions between them. Objections on the ground of irrelevancy are not favored.

Castle v. Bullard, 23 How., 172.

Even if some of this testimony was irrelevant, it was entirely harmless.

III.

The petition and evidence adduced by the defendant in error in support of it, showed a good cause of action, and the court did not err in refusing, at the conclusion of the evidence for defendant in error, to instruct the jury to find for the plaintiff in error, on the pleadings and evidence.

Vide authorities, cited under the first point.

IV.

The first request made by the plaintiff in error to charge the jury was substantially given by the court in its charge, and so was the second request. The court was not bound to repeat the same substantial propositions of law in every variety of form which the ingenuity of counsel may suggest. It is sufficient if it is once laid down, in an intelligible and unexceptionable manner. There was no error in the court refusing to charge as requested.

Keely v. Jackson, 6 Pet., 622.

Ettling v. Bank of U. S., 11 Wheat, 59.

V.

The fifth assignment of error is not well taken. The court expressly charged the jury that, "any *after* act, after the transaction was accomplished, after the 1st day of October, after the arrangement was made, * * can have no influence upon the question." This called the attention of the jury to the transactions—the representations—

which had been done and made before the 1st day of October, which culminated in the defendant in error buying one-eighth interest in the steamboat in question. The statements furnished by the clerk of the boat, Miltenberger, to the defendant in error, were made by the *direction* of the plaintiff in error, and they simply tended, in the language of the charge, "to *explain the facts that happened before*, to explain *how* the transaction came to be entered into at the time the mony was paid over." For this purpose they were relevant and proper. The gravamen of this action was *fraud*—the false and fraudulent representations made by the plaintiff in error to the defendant in error, "that said boat was substantially free from all liens, claims, debts and liability," (p. 13 Record), whereby he, believing said representations to be true, was induced to buy one-eighth interest in said boat, for the sum of $12,000; whereas, the fact was that there were liens, debts, claims, and liabilities against said boat at the very time that said representations were made to the amount of "between sixty and seventy thousand dollars—$68,000, I believe," (p. 57 Record). Even the plaintiff in error, himself, stated, in answer to the question put to him by his own counsel: "What was the total indebtedness—your total indebtedness—as an owner of the boat, on account of that boat, at that time? A. Well, the total indebtedness, I think, was somewhere about $60,000." (p. 83). Would the defendant in error have bought this one-eighth interest in this boat if the plaintiff in error had disclosed the true financial condition of her to him? Let him answer in his own language: "I would buy nothing with incumbrances on it." (p. 31, ans. to 98th int.) "If you had known there was $75,000 indebtedness against that boat in October, 1876, would you have put $12,000 into her for an eighth-interest? A. *No, sir; I wouldn't have put anything in her.*" (p. 38, 199th int.).

Castle v. Bullard, 23 How, 186.

The motive, whether honest or dishonest, is to be ascer-